Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

CITY OF NEW ORLEANS,

Petitioner,

v.

MUNICIPAL ADMINISTRATIVE SERVICES, INC.,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. When considering a forum-selection clause as grounds for remand, should federal courts heighten their scrutiny and require a "clear and unequivocal" waiver of the right to removal before remanding a purely state-law, diversity case?

2. Should a federal court retain a diversity case involving a purely state-law contract dispute, where the defendant contractually agreed to "consent and yield to the jurisdiction of the State Civil Courts of the Parish of Orleans and does hereby formally waive any pleas of jurisdiction on account of the residence elsewhere of the undersigned"?

PARTIES TO THE PROCEEDING

The petitioner before this Court is the City of New Orleans ("the City"), a municipal corporation in the State of Louisiana.

The respondent is Municipal Administrative Services, Inc. ("MAS").

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, the City of New Orleans, respectfully prays that a writ of certiorari issue to review the decision by the United States Court of Appeals for the Fifth Circuit which affirmed the district court's refusal to remand this case to the Louisiana State Civil District Court for the Parish of Orleans, despite the respondent's contractual consent to yield to such jurisdiction.

CITATIONS OF OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is published at 376 F.3d 501. There are two sets of judgments and reasons of the United States Eastern District for the State of Louisiana which are not published. Both are attached hereto in the appendix, and the Order and Reasons of August 14, 2002 can also be found on Westlaw at 2002 WL 1870028.

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1) to grant a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit, entered on July 20, 2004, affirming the federal district court's refusal to remand this case to the state court from which it originated.

CONSTITUTIONAL AND STATUTORY PROVISIONS

There are no constitutional or statutory provisions which govern, or are involved in, the issues in the instant case. Constitutional and statutory references in the argument were

included for the sole purpose of illustrating the contrast between this case, which involves the removal of a purely state law case, and other types of removal cases involving a strong federal interest which would justify the federal court's retention of jurisdiction.

STATEMENT OF THE CASE

This case originated as a Petition for Declaratory Judgment filed on December 19, 2001 by the City of New Orleans in the Louisiana State Civil District Court for the Parish of Orleans. In its petition, the City sought to resolve a contract dispute between itself and MAS, a consultant that it had hired to audit and analyze franchise fee payments made by the local telephone service provider, BellSouth, to the City.[1] On January

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[1]The City had agreed to pay MAS a 20% contingency fee (in addition to a fixed fee not to exceed $100,000.00) on amounts recovered from BellSouth as a result of its audit of the years 1986 through 1996, and it did so. The City then asked MAS to conduct another audit for the years 1997 and 1998, using the same compensation terms. MAS concluded that additional franchise fees were owed; however, BellSouth refused to pay on the grounds that its franchise fee agreement was no longer valid or enforceable after the passage of the 1996 Telecommunications Act. The City ultimately entered into a settlement agreement with BellSouth to cancel the franchise agreement and receive future fixed payments based on the Simplified Tax Legislation–not the franchise agreement. MAS demanded 20% of those future payments. The City objected on the grounds that the payments were not a result of MAS's audit and did not constitute a "recovery" within the meaning of the Agreement. The City filed suit to resolve this dispute.

15, 2002, MAS filed its Notice of Removal, removing the lawsuit to the United States District Court for the Eastern District of Louisiana. The sole basis for removal was diversity jurisdiction.

On January 29, 2002, the City filed a Motion to Remand invoking a forum selection clause contained in its agreement with MAS, which stated as follows:

> Jurisdiction
> The undersigned Contractor does further hereby **consent and yield to the jurisdiction of the State Civil Courts of the Parish of Orleans and does hereby formally waive any pleas of jurisdiction on account of the residence** elsewhere of the undersigned Contractor. (Emphasis added.)

On August 14, 2002, the district court denied the City's Motion to Remand and rendered reasons, which are attached hereto in the appendix. On August 29, 2002, MAS filed its Answer and Counterclaim, seeking a percentage of the monies paid by BellSouth to the City in connection with the settlement.[2]

A non-jury trial was held on March 17, 18 and 19, 2003, and the district judge entered a Judgment on July 15, 2003, finding in favor of MAS in the amount of $1,001,044.00, and entering a declaratory judgment in favor MAS for the annual sum of $323,518.00 as a percentage of the payments to be received by the City from BellSouth in the years 2004, 2005,

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[2]Upon the filing of MAS's counterclaim, the City's Petition for Declaratory Judgment became unnecessary, and the City filed a Motion to Voluntarily Dismiss its Declaratory Judgment Action, which was granted on December 12, 2002.

and 2006. The trial judge also entered his Findings of Fact and Conclusions of Law on that same date, which are attached hereto in the appendix.

The City timely filed a notice of appeal to the United States Court of Appeals for the Fifth Circuit, raising as its first issue the contractual waiver by MAS of any right to removal. The Fifth Circuit rejected the City's argument, holding that the clause must give a "clear and unequivocal" waiver of that right. A copy of that opinion is attached hereto in the appendix. The City now seeks a writ of certiorari from this Honorable Court on the dual basis that (1) the standard employed by the Fifth Circuit conflicts with the ordinary standard of contract interpretation used by other circuits, and (2) the clause in the instant case did, in fact, demonstrate a clear waiver of the right to removal.

REASONS FOR GRANTING THE WRIT

I. The federal courts of appeal are split as to the standard to be used to interpret a forum-selection clause as grounds for remand in a purely state-law, diversity case. Several circuits, including the Fifth Circuit, require "clear and unequivocal" intent to find waiver of a defendant's right to removal, while other circuits apply ordinary principles of contract interpretation in purely state-law, diversity cases.

The Fifth Circuit has elevated the ordinary, procedural right of removal to a sacrosanct, protected right, jealously guarded against contractual waiver by a heightened standard requiring "clear and unequivocal" language in order to effect such waiver. That standard protects the procedural right of removal from contractual waiver even more than the actual, substantive clauses within a contract, which are subject to the mere, ordinary rules of contract interpretation. In fact, under the Fifth Circuit's analysis, scrutiny of contractual waivers to a party's right to removal rises to the same level as the scrutiny given to a waiver of a Sovereign State's immunity from suit in federal court under the Eleventh Amendment of the United States Constitution, *i.e.*, "clear and unequivocal".[3] Not only is

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[3]Any waiver of Eleventh Amendment immunity must be clear and unequivocal. *See College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 676, 119 S.Ct. 2219, 2226, 144 L.Ed.2d 605 (1999); *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 99, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984); *Edelman v. Jordan*, 415 U.S. 651, 673, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974); *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 54, 64 S.Ct. 873, 88 L.Ed. 1121 (1944).

this higher standard unwarranted, it also conflicts with several of the federal circuit courts of appeals interpreting similar contractual clauses.

Specifically, the Fifth Circuit's "clear and unequivocal" standard, on which it decided the remand issue in this case, conflicts with the decisions of the Third and Eleventh Circuits. Those circuits recognize a distinction between contractual waiver, which is governed by the ordinary rules of contract interpretation, and litigation-based waiver, prompted by participation in state court proceedings, which is governed by the "clear and unequivocal" standard.

In *Foster v. Chesapeake Insur. Co.*, 933 F.2d 1207 (3d Cir. 1991), the court rejected the standard of "clear and unequivocal" for contractual waivers, noting that the standard had originated in the context of waiver by a defendant's participation in state court proceedings. 933 F.2d at 1217, n. 15 (citing J. Moore & B. Ringle, 1A *Moore's Federal Practice* ¶0.157[9] at 152). The *Foster* Court reasoned:

> In the context of litigation-based waiver, the "clear and unequivocal" standard makes sense. Otherwise, in order not to waive the right to remove defendants would have to remain inactive in the state court, running the peril of being held in default should a remand from the district court later occur. *See Moore's* ¶ 0.157 [9] at 154.
>
> **In the context of contractual waiver, however, we do not perceive the need for the "clear and unequivocal" standard.** While it is true that removal represents what has somewhat reverently been called "a statutory right to a federal forum" (a right the Supreme Court was obviously willing to vindicate in *Thermtron*),

this talismanic phrase loses much of its fire in light of the fact that for "approximately five score years" the federal courts "have construed the removal statutes *strictly* and, on the whole, *against* the right of removal," *Moore's* ¶ 0.157[1.-3] at 38 (emphasis added). **The "clear and unequivocal" standard, then, fails to consider the *constrictive* rather than *expansive* nature of the right of removal, in addition to serving no meritorious policy of litigation.** It probably had its genesis in the notion, now discarded, that forum selection clauses were presumptively *unenforceable* as "contrary to public policy" or as an illegal attempt to "oust" the court's jurisdiction. The Supreme Court has said that this notion is old-fashioned and contrary to freedom of contract. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. at 10-12, 92 S.Ct. at 1913-14.

We think the "clear and convincing" standard so stringent as to be contrary to the right of parties to contract in advance regarding where they will litigate. A court simply should determine contractual waiver of the right to remove using the same benchmarks of construction and, if applicable, interpretation as it employs in resolving all preliminary contractual questions. Indeed, inasmuch as the determination of whether there is a waiver of the right of removal to be derived from a forum selection clause will at least in some cases, such as here, be a matter of construction and thus of law, it seems anomalous to speak of a "clear and unequivocal" standard for we simply make plenary determinations of legal issues.

933 F.2d at 1217, n. 15 (bold emphasis added, italicized emphasis by *Foster* Court).

Similarly, in *Suter v. Munich Reinsurance Co.*, 223 F.3d 150 (3d Cir. 2000), the court reaffirmed this reasoning and further refined the analysis of contractual waivers by recognizing a distinction between contractual waiver for diversity jurisdiction cases from cases involving a federal interest, such as suits brought under the Federal Sovereign Immunities Act ("FSIA") or the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention Act"). The *Suter* Court faced the issue of whether a service of suit clause in a reinsurance treaty operated as a waiver of the defendant's right to remove under the Convention Act.[4] 223 F.3d at 154. This situation, involving a federal interest and preference for a federal forum, was analogous to the cases involving the Federal Arbitration Act and the FSIA. *See Patten Sec. Corp. v. Diamond Greyhound & Genetics*, 819 F.2d 400 (3rd Cir. 1987); *Texas Eastern Transmission Corp.*, 15 F.3d 1230 (3d Cir. 1994); *In re Delta America Re Insurance Co.*, 900 F.2d 890 (6th Cir. 1990). Accordingly, the Third Circuit distinguished the *Suter* service of suit clause from that of *Foster*, which involved a waiver of diversity jurisdiction removal. 223 F.3d at 156. The considerations of the Convention Act warranted the requirement of "clear and unequivocal" waivers of the right to removal, whereas ordinary waivers of diversity jurisdiction do not. 223 F.3d at 158.

The *Suter* Court noted that its decision to employ the "clear and unequivocal" standard **in the context of the Convention Act** was consistent with the Fifth Circuit standard. However, in the instant case, the Fifth Circuit applied that standard in the context of diversity jurisdiction over purely state

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[4]*Foster* had also involved a service of suit clause, but removal was sought solely on the basis of diversity of citizenship.

law issues. Thus, the Fifth Circuit's *City of New Orleans v. MAS* decision is wholly inconsistent with the well-reasoned analysis of the Third Circuit's decisions of *Foster*, *Patten* and *Suter*.

Special circumstances involving a federal interest or favoring a federal forum warrant that a higher standard be applied to forum selection clauses before finding waiver. Ordinary cases involving diversity jurisdiction and purely state law issues do not merit such protection against waiver. *City of New Orleans v. MAS* is at the opposite end of the spectrum from the federal interest cases.[5] The Fifth Circuit's blanket requirement for "clear and unequivocal" language in ***all*** situations involving a potential waiver of removal is inconsistent with the Third Circuit and is unsupported by the policy considerations carefully outlined by that court.

Likewise, the Eleventh Circuit recognizes the same distinctions between contractual waivers and litigation-based waivers, as well as those between diversity jurisdiction cases and those cases involving a federal interest, such as suits brought under the FSIA or the Convention Act. In *Snapper, Inc. v. Redan*, 171 F.3d 1249 (11th Cir. 1999), the court

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[5]The issues in instant case heavily involve state interests, even more so than a typical contract dispute. The City of New Orleans, a local public entity restricted by certain provisions in the Louisiana State Constitution, challenged MAS' interpretation of the contract to pay contingency fees, in addition to an hourly fee, as violating the Louisiana State Constitution's prohibition against public entities awarding bonuses. The City respectfully submits that, in light of the forum selection clause, a state court certainly should have been deciding this issue.

expressly rejected the "clear and unequivocal" standard to assess a forum selection clause contained in security agreements involving state law issues, favoring ordinary principles of contract interpretation. *Id.* at 1260. Responding to the defendant's argument that the clause did not meet that higher threshold, the court declared:

> We need not decide whether the clause rises to the level of a clear and unequivocal waiver because **we do not agree that such a high standard is required or desirable**. Admittedly, there is some confusion in the circuits about whether a waiver of the right to remove must be "clear and unequivocal." As the Third Circuit has demonstrated, however, the cases that have applied this standard have arisen when the removing party participated in actions in the state court prior to removal that might be interpreted as a waiver of the right to remove. *See Foster v. Chesapeake Ins. Co.*, 933 F.2d 1207, 1217 n. 15 (3d Cir.1991). **Such litigation-based waivers must be distinguished from the contractual waivers at issue in this case and in *Foster*.**

171 F.3d at 1260-61 (emphasis added).

Moreover, the *Snapper* Court voiced its agreement with *Foster*'s holding that in the context of removal based solely on diversity jurisdiction, ordinary contract principles govern a contractual waiver, noting that removal under the FSIA should be interpreted broadly. Where such considerations are not present, as in *Snapper*, *Foster*, or in the instant case, ordinary contract principles apply.

The *Snapper* Court also thoroughly researched the approaches taken by other circuits and observed:

> Other circuits generally either have assumed implicitly that ordinary principles of contract interpretation govern in the context of contractual waivers or have applied a watered down version of the clear and unequivocal standard. Thus, for example, the Second Circuit has found waiver even when the forum selection clause did not expressly waive removal because "the parties' inclusion of the forum-selection clause makes little sense unless it precludes removal...." *Karl Koch Erecting Co. v. New York Convention Ctr. Dev. Corp.*, 838 F.2d 656, 659 (2d Cir.1988). A Ninth Circuit case similarly made no mention of the clear and unequivocal standard in holding that the language in an employee handbook, included because federal regulations required it, did not amount to a waiver of removal. *See Clorox Co. v. United States Dist. Court*, 779 F.2d 517, 521 (9th Cir.1985). ... *But see Regis*, 894 F.2d at 195 (finding that a contractual waiver of removal was not clear and unequivocal).

171 F.3d at 1261 (footnotes omitted).

The Eleventh Circuit had steadfastly continued to apply ordinary principles of contract interpretation to contract clauses involving forum selection or jurisdictional waivers. In *Russell Corp. v. American Home Assurance*, 264 F.3d 1040 (11th Cir. 2001), the court held that an insurer had waived its right of removal through the service of suit clause contained in its policy, in which it had agreed to "comply with all requirements necessary to give such court jurisdiction". *Id.* at 1046. By agreeing to this clause, the insurer agreed to "go in, and stay" in the forum chosen by its insured. *Id.*

Moreover, the *Russell* Court noted that every federal court (excluding those addressing removal under the Foreign

Sovereign Immunities Act) ... interpreting a similar service of suit clause has held that such language constituted a waiver of the right to remove, citing *The Travelers Ins. Co. v. Keeling,* 996 F.2d 1485, 1487-90 (2d Cir.1993); *Foster v. Chesapeake Ins. Co.* 933 F.2d 1207, 1216-19 (3d Cir.1991); *Transit Cas. Co. v. Certain Underwriters at Lloyd's of London, et al.,* 119 F.3d 619, 622-23 (8th Cir.1997); *Public Util. Dist. No. 2 of Grant County v. Illinois Employers Ins. of Wausau,* 15 F.3d 1088 (9th Cir.1994) (unpublished opinion). *Russell*, 264 F.3d at 1047 (footnote omitted).

Noticeably missing from this collection of jurisdictions are the Fifth and Sixth Circuits. The Fifth Circuit has since applied the higher standard even to contractual waivers in diversity jurisdiction cases.[6] The Sixth Circuit has not addressed this issue in the purely diversity jurisdiction/no federal interest context. Significantly, the defendant/insurer in *Russell* relied on decisions by these two aberrant circuits,[7] and its argument was resoundingly repudiated by the *Russell* Court, stating:

> Both *Regis* and *Delta* were based on the discredited standard that "[a]lthough the right to remove can be waived, the case law makes it clear that such waiver must be clear and unequivocal." *Regis,* 894 F.2d at 195;

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[6]*City of New Orleans v. Municipal Administrative Services, Inc.*, 376 F.3d 501 (5th Cir. 2004); *Waters v. Browning-Ferris Industries, Inc.*, 252 F.3d 796 (5th Cir. 2001) (finding that waiver occurred under the higher standard).

[7]*McDermott Int'l, Inc. v. Lloyds Underwriters of London,* 944 F.2d 1199 (5th Cir. 1991); *In re Delta America Re Ins. Co.,* 900 F.2d 890 (6th Cir. 1990); *Regis Assocs. v. Rank Hotels (Mgmt.) Ltd.,* 894 F.2d 193, 194 (6th Cir. 1990).

In re Delta Am., 900 F.2d at 892. We rejected this standard in *Snapper:*

> The Guarantors contend that a contractual waiver of removal rights must be "clear and unequivocal" and that the provision at issue does not meet this high threshold. *We reject this standard.*
> 171 F.3d at 1260 (emphasis by *Russell* Court).

Russell, 264 F.3d at 1048.

It is widely recognized by the appellate courts and legal scholars that this conflict exists among the circuit courts of appeals.[8] This Honorable Court has never addressed the governing standard for evaluating contractual waivers of the right to removal. The issue will only become more prevalent as parties negotiate contracts across state lines and bargain for home-court fora as a legitimate element of those negotiations. It becomes essential to have a uniform standard by which to evaluate such clauses, in furtherance of interstate commerce and judicial economy. This case presents an opportunity for this Court to determine whether contractual clauses such as the one in the instant case will be governed by ordinary principles of

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[8]*See, e.g.*, Hon. David Hittner, et al., Practice Guide: Federal Civil Procedure Before Trial, 5th Circuit Edition, Ch. 2D-6 [2:890] (2004); V. Frederic Lyon, Douglas W. Ackerman, *Controlling Disputes by Controlling The Forum: Forum Selection Clauses In Construction Contracts*, 22 Construction Law. 15, 17 (2002); Walter W. Heiser, *Forum Selection Clauses in Federal Courts: Limitations on Enforcement after Steward and Carnival Cruise*, 45 Fla. L. Rev. 553, 599-600, n. 238 (1993); Michael E. Solimine, *Forum-Selection Clauses and the Privatization of Procedure*, 25 Cornell Int'l L.J. 51, 89-90 (1992).

contract interpretation, or isolated under the rare, higher standard of "clear and unequivocal" expression of intent. Accordingly, this Court should grant this Petition for Writ of Certiorari and settle the conflict in the circuit courts of appeals over the standard to be used in interpreting waiver of removal clauses in contracts.

II. There is a split within the circuits which apply the "clear and unequivocal" test as to what constitutes a clear and unequivocal waiver of the right to remove to federal court.

A second split, or "subconflict", exists among and within the circuits theoretically applying the "clear and unequivocal" test. The Eleventh Circuit in *Snapper, supra*, recognized the wide divergence of results even within the circuits which espouse the "clear and unequivocal" standard, describing some applications as being so "watered down" that the result fit more within the decisions of courts using the contract interpretation standards. *Snapper*, 171 F.3d at 1261. As the *Snapper* Court observed:

> The Tenth Circuit purported to follow the Sixth Circuit's decision in *Regis* by invoking the clear and unequivocal standard for a contractual waiver in *Milk 'N' More v. Beavert,* 963 F.2d 1342, 1346 (10th Cir.1992). That court found a valid waiver in a contract that stated that "venue shall be proper under this agreement in Johnson County, Kansas" because the provision was **"reasonably clear,"** *id.*, suggesting that the court's application of **the standard is so watered down as to be virtually indistinguishable from the ordinary interpretive tools that we [Eleventh Circuit] employ today.** (Emphasis added.)

Thus, while the Tenth Circuit purportedly relies on the higher "clear and unequivocal" standard for determining whether a party intended to waive its right to removal, its results actually conflict with the results of the Fifth and Sixth Circuits – the staunchest advocates of the heightened standard. In the Tenth Circuit, the contract's reference to a county, as opposed to a federal judicial district, constituted a "clear and unequivocal" waiver of the right to remove to federal court. By contrast, the Fifth Circuit in the instant case held that analogous language ("consent and yield to the jurisdiction of the State Civil Courts of the Parish of Orleans") in the contractual provision in the instant case did ***not*** constitute a clear and unequivocal waiver.[9]

Interestingly, the district court in *Milk 'N' More* considered another factor that certainly would have favored the City of New Orleans in the instant case. That is, forum selection clauses "should be enforced when invoked by the party for whose benefit they are intended." 963 F.2d at 1344, citing *Furry v. First Nat'l Monetary Corp.*, 602 F.Supp. 6, 9 (W.D. Okla. 1984). Clearly, the clause was intended to benefit the City of New Orleans in the instant case, yet the district court and Fifth Circuit deemed it "ambiguous", and thus, construed it *against* the party it was intended to benefit, simply because the City had drafted the contract. The Tenth Circuit did not contradict the validity of this principle. Yet, at the same time it acknowledged the correctness of other decisions and

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[9]For all practical purposes, the governmental unit "Parish" in Louisiana is functionally equivalent to the county governmental unit in the other 49 states.

conflicting principles which upheld the right of removal.[10] Ultimately, the court relied on the well-established principle that such clauses are *prima facie* valid and should be enforced unless enforcement is shown by the resisting party to be unreasonable under the circumstances, citing *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10, 92 S.Ct. 1907, 1913, 32 L.Ed.2d 513 (1972). The court found that the clause seemed "reasonably clear and the wording strongly points to the state court of that county".

Several years later, the Tenth Circuit reiterated its purported use of the "clear and unequivocal" standard while, in fact, it applied basic contract principles. *Excell v. Sterling Boiler and Mechanical*, 106 F.3d 318 (10th Cir. 1997). In fact, the appellate court expressly exercised the *de novo* review standard **because it was reviewing "the district court's interpretation of the contract clause [which] turned on 'an analysis of the language and an application of the principles of contract interpretation**,' ... ." *Id.* at 320 (emphasis added). The court went on to discuss the distinction between "mandatory" and "permissive" forum selection clauses, explaining:

> Mandatory forum selection clauses "contain[ ] clear language showing that jurisdiction is appropriate

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[10] 963 F.2d at 1346, citing *Regis Assocs.*, 894 F.2d at 195 (holding that nothing in language chosen suggested intent to waive right of removal); *Link Design, Inc. v. Lahr,* 731 F.Supp. 1535, 1536 (M.D. Fla.1990) (holding that interpretation of clause permitting removal was proper despite designation of Polk County, Florida, for any legal action under agreement); *Keaty v. Freeport Indonesia, Inc.,* 503 F.2d 955, 957 (5th Cir. 1974) (construing forum selection clause against drafter), which in that case, was plaintiff Milk 'N' More.

> only in the designated forum." ... For example, a clause stating "venue for any dispute arising under or in relation to this contract shall lie only in the Seller's state and county," has been deemed mandatory. ... In contrast, permissive forum selection clauses authorize jurisdiction in a designated forum, but do not "prohibit litigation elsewhere." ... An example of a permissive forum selection clause is: "The parties agree that in the event of litigation between them, Franchise Owner stipulates that the courts of the State of Michigan shall have personal jurisdiction over its person, that it shall submit to such personal jurisdiction, and that venue is proper in Michigan." *Id.* at 321 (citations omitted).

Addressing the forum selection clause before the court, which provided for jurisdiction in the State of Colorado and venue in the County of El Paso, Colorado, the court held that giving the "plain meaning" to the language in the contract (*i.e.*, basic contract interpretation principles), the clause was mandatory and the right of removal had been waived. *Id.* Significantly, there exists a federal district court *in the County of El Paso* to which the case could have been removed. The court rejected the defendant's argument that the clause could be "reasonably interpreted" to include the federal as well as state court in that county. The court noted that for federal court purposes, venue is not stated in terms of "counties." Rather, it is stated in terms of "judicial districts." *See* 28 U.S.C. § 1391. Where a forum selection clause refers only to a specific county and not to a specific judicial district, the court held that venue is intended to lie only in state district court. *Excell*, 106 F.3d at 321.

As previously noted, the governmental unit of "Parish" in Louisiana is functionally equivalent to that of "County" in every other state. The forum selection clause in the instant

case, by which defendant MAS agreed to **yield to the jurisdiction of the State Civil Courts of the *Parish* of Orleans**, cannot be interpreted as including the federal district court in Orleans Parish. "Yield" indicates a forfeiture of choice, and "Parish of Orleans" indicates a state court forum.

Significantly, in *Dixon v. TSE International, Inc.*, 330 F.3d 396 (5th Cir. 2003), the Fifth Circuit rendered a *per curiam* decision ***with absolutely no reference*** to the "clear and unequivocal" standard, but affirmed the district court's interpretation of the contract and remand order. The federal courts in *Dixon* both relied on the phrase "Courts ***of*** Texas" to conclude that only state courts were included and that the right of removal had been waived. The Fifth Circuit explained:

> [T]he word 'of' is 'used as a function word to indicate belonging or a possessive relationship,' and that the federal courts of the Eastern District of Texas are not courts *of* Texas because they do not belong to Texas, but rather are courts *of* the United States.
>
> * * *
>
> *Black's Law Dictionary* defines "of" as "denoting that from which anything proceeds; indicating origin, source, descent." Federal courts indisputably proceed from, and find their origin in, the federal government, though located in particular geographic regions. By agreeing to litigate all relevant disputes solely in "the Courts of Texas," TSE waived its right to removal.

330 F.3d at 397-98 (footnote omitted).

One year after deciding *Dixon*, the Fifth Circuit rendered its decision in the instant case. Like the contractual provision in *Dixon*, the clause in *City of New Orleans v. MAS* requires that the defendant yield to the jurisdiction ***of the State Civil Courts of the Parish of Orleans***. The United States District Court for the Eastern District of Louisiana, to which this case was removed, certainly does not belong to, proceed from, originate or descend from the State of Louisiana! The extremely narrow and restrictive application of the "clear and unequivocal" standard in the instant case strongly conflicts with the Tenth Circuit cases which theoretically apply the same standard, and is entirely inconsistent with another Fifth Circuit decision addressing analogous language.

Moreover, the clause in the instant case further provides that MAS formally waives "any pleas of jurisdiction on account of the residence elsewhere of the undersigned Contractor." In filing its petition for removal in federal court, MAS pleaded diversity jurisdiction on account of its residence in Texas. This plea of diversity jurisdiction was specifically waived by the language quoted above from the parties' contract. In *Snapper v. Redan*, 171 F.3d at 1252, 1262, the district and appellate courts held that the defendants' waiver of any rights accruing to them by virtue of their domicile included a waiver of the right to remove based on diversity jurisdiction. Removal premised on diversity jurisdiction is a right based on domicile. The Eleventh Circuit soundly rejected the defendants' argument that the waiver referred only to personal jurisdiction – the same argument offered by MAS in this case, and accepted by the lower courts herein. The *Snapper* Court noted that the provision to waive "whatever rights" necessarily encompasses more than one right. Therefore, the defendants must have waived more than a personal jurisdiction challenge. According to the *Snapper* Court, "Removal is the most obvious, if not the

only, candidate for an additional right based on domicile that might be covered by this clause." 171 F.3d at 1262.

Likewise, in the instant case, the clause at issue called for the formal waiver of "**any pleas** of jurisdiction on account of the residence elsewhere of the undersigned Contractor." Clearly, more than one type of plea of jurisdiction is waived by this out-of-state contractor. Thus, even assuming that this waiver included pleas regarding personal jurisdiction (superfluously, in light of the fact that the contract was executed and performed in Louisiana, and the Louisiana's Long Arm statute reaches the full extent allowed by the Due Process clause), the waiver of "any pleas" necessarily encompasses more than the one plea of personal jurisdiction. "Any pleas of jurisdiction" based on residency includes a plea of diversity jurisdiction based on MAS' Texas residency. Certainly, this additional language, compounded with the agreement to "yield to the jurisdiction of the State Civil Courts of the Parish of Orleans" should constitute a waiver of MAS' removal rights, even under the "clear and unequivocal" standard.

Apparently, the elusive "clear and unequivocal" standard is anything but "clear" when applied by the various federal courts throughout the United States. A writ of certiorari is warranted for this Court to establish an objective test for determining whether a contractual clause constitutes waiver of removal. Such a test should recognize the significance of choosing certain geographic and political terminology, such as specification of state or local political subdivisions, as indicating an intent to restrict venue to state courts. It should not limit the waiver to one type of jurisdiction where a plural reference is used, such as "any pleas of jurisdiction" or "whatever rights". It should also consider whether the clause would become superfluous if interpreted as allowing removal, or whether it would still be meaningful, independent of the

removal context. Under the circumstances of the instant case, where MAS had numerous contacts with Louisiana and overwhelmingly met the requirements of the Long Arm statute, the clause is superfluous if it is limited to waiving personal jurisdiction. However, if interpreted to include waiver of pleas of diversity jurisdiction in a removal situation, then the City has obtained a meaningful waiver. For all of these reasons, in addition to the conflict in the circuits of whether to use the higher standard at all, this Court should grant a writ of certiorari to clarify an issue which will be increasingly litigated in the future.

CONCLUSION

In conclusion, if this case had been removed to a court governed by the jurisprudence of the Third, Tenth or Eleventh Circuits, then the contractual provision regarding jurisdiction would have been interpreted as a mandatory forum selection clause, waiving the right to removal, and the case would have been remanded to the state court. Other circuits are less predictable, either because they have never addressed the issue, or because their decisions do not cite a specific standard when considering remand based on contractual waivers. However, because this case was removed to a district court in the Fifth Circuit, the forum selection clause did not withstand the narrow interpretation and stringent application of the "clear and unequivocal" test.

A case's removability – and waiver thereof – should not vary from jurisdiction to jurisdiction. Parties must be able to enter contracts containing a forum selection clause with the confidence that it will be interpreted and enforced uniformly by the federal courts throughout the United States. Because of the widely-recognized uncertainty caused by the conflicting

standards set by the courts of appeals, in a context that has never been addressed by this Court, a writ of certiorari is warranted in this case.

Respectfully submitted,

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CITY OF NEW ORLEANS,
Plaintiff-Counter Defendant-Appellant,

v.

MUNICIPAL ADMINISTRATIVE SERVICES, INC.,
Defendant-Counter Claimant-Appellee.

No. 03-30872.

United States Court of Appeals,
Fifth Circuit.

July 20, 2004.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before SMITH, WIENER, and BENAVIDES, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

The City of New Orleans appeals a judgment awarding Municipal Administrative Services, Inc. ("MAS"), the amount due it under a contingency fee contract. Finding no error, we affirm.

I.

MAS[1] entered into a contract with the city to audit BellSouth's royalty payments to the city. The contract provided that in addition to a fixed fee, the city would pay MAS 20% of the amount it recovered from BellSouth. MAS found that BellSouth had incorrectly stated its revenue and owed the city additional royalties. After negotiation and litigation, the city entered into an agreement with BellSouth according to which BellSouth did not admit its liability for the past royalties, but agreed to pay the city $5.5 million per year for five years, and the city agreed to support changes in Louisiana governing law.

The city refused to pay MAS its 20% contingency fee and sued in state court for a declaratory judgment that it did not owe the fee. MAS removed to federal court and filed a counterclaim for the fees, after which the city dropped its claim for declaratory judgment, and both sides acknowledged that MAS would bear the burden of proof of establishing that it was entitled to the fees. The city moved for remand on the basis of a contractual clause by which, the city claimed, MAS had waived its right to removal. The district court denied remand.

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[1]MAS was founded in 1987 by George White, who had been employed in the Franchise Administration Department of the City of Houston, where he had acquired expertise in the field of utility tax franchises. White realized that few people outside city government possessed franchise expertise, and he founded MAS to provide consulting services to municipal governments. MAS provided services to approximately one hundred municipalities, and White had experience auditing Southwestern Bell's franchise fees, resulting in substantial recoveries for other cities.

After a bench trial, the court entered judgment for MAS, awarding damages and a declaratory judgment that the city must pay MAS a portion of its recovery from BellSouth in future years. The city appeals, arguing that the district court erred in denying its motion to remand, committed clear error in finding that the amount of its settlement with BellSouth constitutes a recovery as a result of MAS's audit within the meaning of its contract, and erred in finding that its contingency fee arrangement did not violate the Louisiana Constitution's prohibition on the donation of public funds.

II.

We review the denial of a motion to remand *de novo*. *Miller v. Diamond Shamrock Co.*, 275 F.3d 414 (5th Cir. 2001). The city filed suit in Orleans Parish Civil District Court (CDC), seeking a declaratory judgment. MAS removed to federal court, alleging diversity of citizenship. The city does not deny that the requirements of 28 U.S.C. § 1332 are met but moved to remand on the basis of a contract clause that the city claims requires litigation exclusively in the CDC.

The clause in question reads as follows:

> *Jurisdiction*
> The undersigned Contractor does further hereby consent and yield to the jurisdiction of the State Civil Courts of the Parish of Orleans and does hereby formally waive any pleas of jurisdiction on account of the residence elsewhere of the undersigned Contractor.

The city claims that this clause constitutes not only MAS's consent to jurisdiction in the CDC, but also a waiver of MAS's right to remove to federal court. MAS counters that the clause evinces consent to personal jurisdiction in the Louisiana state

courts but does not specify those courts as the exclusive venue for lawsuits arising from the contract, and does not waive MAS's right of removal. The district court agreed with MAS, holding that the clause was not a clear and unequivocal waiver of MAS's removal rights and that any ambiguity should be construed against the city as the drafter of the contract.

For a contractual clause to prevent a party from exercising its right to removal, the clause must give a "clear and unequivocal" waiver of that right. *McDermott Int'l, Inc. v. Lloyds Underwriters,* 944 F.2d 1199 (5th Cir. 1991); *Waters v. Browning-Ferris Indus., Inc.,* 252 F.3d 796 (5th Cir. 2001). A party may waive its rights by explicitly stating that it is doing so, by allowing the other party the right to choose venue, or by establishing an exclusive venue within the contract.

A party's consent to jurisdiction in one forum does not necessarily waive its right to have an action heard in another. For a forum selection clause to be exclusive, it must go beyond establishing that a particular forum will have jurisdiction and must clearly demonstrate the parties' intent to make that jurisdiction exclusive. *Keaty v. Freeport Indonesia, Inc.,* 503 F.2d 955 (5th Cir. 1974). It is important to distinguish between jurisdiction and venue when interpreting such clauses. Although it is not necessary for such a clause to use the word "venue" or "forum," it must do more than establish that one forum will have jurisdiction.

In *Keaty, id.* at 956, the clause in question read, "This agreement shall be construed and enforceable according to the law of the State of New York and the parties submit to the jurisdiction of the courts of New York." The court held that this provision demonstrated consent to be subject to the jurisdiction of the courts of New York, but did not constitute a

mandatory forum-selection clause, and was therefore insufficient to constitute a waiver of the right to removal.

The city commends *City of Rose City v. Nutmeg Ins. Co.*, 931 F.2d 13 (5th Cir. 1991), as standing for the proposition that a contractual clause may defeat the right of removal, despite that it does not explicitly use the word "removal" or "venue." Properly understood, however, *Rose City* is inapposite. The clause in *Rose City* stated,

> [W]e, at your request agree to submit to the jurisdiction of any Court of Competent jurisdiction within the United States and will comply with all requirements necessary to give such Court jurisdiction and all matters arising hereunder shall be determined in accordance with the law and practice of such court.

Id. at 14.

The *Rose City* court held that the clause defeated Nutmeg's right to removal because it unambiguously required that Nutmeg "submit to the jurisdiction of any court of the policyholder's choosing." The decision turned not on the use of the word "jurisdiction," and not on venue or forum, but on the contract's giving one party the exclusive right to choose the forum of any proceedings.

The most reliable reading of *Rose City* is that a clause granting one party the right to choose venue must plainly give the party that right. Here, however, there is no indication that MAS gave the city the exclusive right to choose the venue in which the suit would proceed. Rather, as in *Keaty,* one jurisdiction is specified, but neither is any other jurisdiction excluded, nor does MAS consent to something so indefinite as the jurisdiction of the city's choosing. The city's reliance on *Rose City* is unfounded.

The city claims that the clause in this case is sufficiently explicit and unequivocal to constitute waiver of MAS's removal rights. The city maintains that for the clause to have meaning, it cannot be read as merely consenting to personal jurisdiction in the Louisiana courts, because jurisdiction is established by statute in Louisiana, so the clause must therefore establish exclusive jurisdiction. The city further avers that by waiving "pleas of jurisdiction on account of the residence elsewhere of the undersigned Contractor," MAS effectively agreed not to invoke the diversity jurisdiction of the federal courts.

The district court properly rejected this argument. Although such a reading is possible, it is not the only plausible reading of the clause, nor is it the most felicitous. It ignores the chance that, absent the clause, MAS could challenge the exercise of personal jurisdiction by the Louisiana courts.

Although the City attempts to beg the question that personal jurisdiction would exist absent the clause, it is by no means certain that this assertion would survive a challenge or that the city did not benefit by avoiding any potential litigation expenses it might have incurred had MAS been permitted to challenge personal jurisdiction. Moreover, the city's interpretation ignores the possibility that MAS might have brought suit first and might have done so in a venue where it was not required to plead its citizenship to establish jurisdiction.

The failure of the clause to demonstrate a clear and unequivocal waiver of MAS's removal rights is highlighted by contrast to an effective clause in a different city contract. In *City of New Orleans v. Nat'l Serv. Cleaning Corp.*, 1996 U.S. Dist. LEXIS 10637 (E.D. La. July 24, 1996), the city included the following clause in its contract: "The contractor hereby consents to and stipulates to the personal jurisdiction and venue

of the Civil District Court for the Parish of Orleans, Louisiana in any litigation brought under this Article." The court noted the clarity of the clause in specifying that the contractor "consents" and "stipulates" to "personal jurisdiction" and "venue." Here, by contrast, the clause evinces conclusively no more than that MAS consented to jurisdiction and agreed not to raise pleas to jurisdiction.

As the district court noted, the clause is, at the very least, susceptible to more than one reasonable interpretation. This ambiguity must be construed against the city as drafter. The very presence of ambiguity indicates that the clause does not contain a "clear and unambiguous" waiver of rights and is therefore ineffective as a waiver. The city's motion to remand was properly denied.

III.

The city also cites as error the district court's findings of fact. The contract between the city and MAS required the city to pay MAS 20% of "any amounts recovered" from BellSouth as a result of MAS's audit. The city claims that the money it receives pursuant to its settlement agreement was not an amount "recovered" under the terms of the contracts, and contends that MAS is not entitled to a contingency fee on that amount.

After a bench trial, the district court made findings of fact and conclusions of law, pursuant to Fed.R.Civ.P. 52(a). We review findings of fact for clear error. *Alexander v. Cockrell,* 294 F.3d at 628; *Anderson v. City of Bessemer City, N.C.,* 470 U.S. 564, 573, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985); Fed.R.Civ.P. 52(a) ("Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of

the witnesses."). We review conclusions of law--including contractual interpretations–*de novo. Marquette Transp. Co. v. La. Mach. Co.*, 367 F.3d 398, 402 (5th Cir. 2004).

The district court found that the terms of the contract were unambiguous. Reading the provision that required the city to pay MAS "a contingency fee equal to twenty percent (20%) of any amounts recovered" in light of the contract as a whole, the court found that the settlement with Bellsouth constituted a recovery. It also found that the recovery was a result of MAS's audit, and that therefore MAS was entitled to its 20% contingency fee. The court based this finding on its credibility determinations regarding the testimony of several witnesses regarding the nature of the settlement and MAS's contribution to it. This was not error.

IV.

The city contends that payment of MAS's contingency fee would constitute a donation of public funds in violation of the Louisiana Constitution. The district court held that the fee is not unconstitutional. We review *de novo* the district court's conclusion of law derived from its factual findings. *United States v. Villalobos,* 161 F.3d 285 (5th Cir. 1998).

It is a settled matter of state law that a municipality may agree to a contingency fee. *Town of Mamou v. Fontenot,* 816 So.2d 958, 966 (La. App. 3d Cir.), *writ denied,* 827 So.2d 1162 (La. 2002). The City, however, contends that MAS has already been sufficiently compensated and that payment of the contingency fee would constitute an unreasonable bonus. A bonus violates the Louisiana Constitution if not based on services and is an additional payment for duties the party was already contractually obligated to perform and was receiving

compensation. *Varnado v. Hosp. Serv. Dist. No. 1*, 730 So.2d 1066, 1068 (La. App. 1st Cir. 1999).

The district court made factual findings that the contingency fee was not a bonus to MAS but was part of its bargained-for compensation,[2] and that the amount recovered by

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[2]Apparently, the city did not notice the purported illegality of the 20% contingency fee at the time it entered into the contract. The district court found that at the outset of MAS's audit, BellSouth refused to allow MAS access to its documents and contended that the contingency arrangement was illegal. In response, the city represented that "[t]here is no prohibition of this type of arrangement in Louisiana, nor is it recognized as unfair or a violation of public policy." The city now argues that, given the size of its recovery, a 20% fee would compensate MAS too much for the number of hours it worked. In attempting to reduce a contingency fee arrangement to an hourly rate, the city misrepresents the nature of such an arrangement. It ignores the element of risk involved *ex ante* in MAS's agreeing to work for a contingency, and it attempts to make an *ex post* appropriation of the upside of the deal. The city has provided no legal justification for refusing to pay its contingency fee. There is no comparison to customary fees in such situation, nor is there an attempt to discount the resulting fee to the time of the contract, nor an analysis of how the premium MAS would achieve over its normal hourly rate compares to the risk it bore and the expertise it provided. The sheer magnitude of a fee alone does make it unreasonable or unenforceable. Where an initial percentage is reasonable at the time the contract is formed, the fact that the extent of recovery, and the commensurate contingency fee, are much larger than a party expected at the outset does not invalidate the fee. Rather, it demonstrates that the contract properly

the city was a result of the services MAS provided. Considering evidence of the difficulty of the work MAS performed and the expertise that MAS possessed but the city lacked, the court concluded that the fee was not unreasonable and could not, therefore, be characterized as a donation of public funds. In light of these factual findings, the district court's conclusion that the city had no legal basis for refusing to pay MAS in accordance with the contract is fully correct.

AFFIRMED.

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constructed incentives such that both parties are even better off than they had anticipated.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CITY OF NEW ORLEANS	**CIVIL ACTION**
versus	**No. 02-130**
MUNICIPAL ADMINISTRATIVE SERVICES, INC.	**SECTION: I/2**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed Jul. 15, 2003)

In this civil action for breach of contract and declaratory judgment, Municipal Administrative Services, Inc. ("MAS") seeks the balance of fees allegedly owed to it pursuant to a contract for professional services between MAS and the City of New Orleans (the "City"). Specifically, MAS and the City entered into a contract whereby MAS agreed to perform an audit of franchise fees paid to the City by BellSouth Telecommunications, Inc. ("BellSouth") in exchange for an agreed upon sum plus a 20% contingency fee of "any amounts recovered, refunded, or credited" from BellSouth.[1] Based upon MAS' audit findings, the City filed a lawsuit against BellSouth which was resolved by a final settlement agreement pursuant to which BellSouth agreed to pay the City a fixed annual sum of $5,500,000.00 for six years.[2] Thereafter, a dispute arose between MAS and the City as to the amount of compensation owed MAS.[3] On December 17, 2002, the City

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[1] R. Doc. No. 96, MAS' Post-trial memorandum, p. 1.

[2] R. Doc. No. 86, Pretrial order, Uncontested facts, ¶7 .v, .bb.

[3] Specifically, it is alleged that MAS provided services pursuant to the contract between the parties and received $495,426.00 in payments from the City. That amount represented the fixed sum agreed upon by

(Continued on following page)

filed the present action against MAS in the Orleans Parish Civil District Court and MAS removed this lawsuit to this Court.[4]

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the parties and 20% of the proceeds of a $2,500,000.00 partial settlement between the City and BellSouth. R. Doc. No. 86, Pretrial order, Uncontested facts, ¶¶7 .p., .ff. Thereafter, on July 25, 2000, the City filed a lawsuit against BellSouth in Orleans Parish Civil District Court for additional franchise fee payments allegedly due which lawsuit BellSouth removed to this Court. R. Doc. No. 4, Memorandum of MAS, p. 2. Ultimately, the City and BellSouth settled their lawsuit. *Id.* Following the settlement, MAS made a demand on the City to pay it an additional 20% commission of the final settlement benefits received by the City. The City, however, refused on the basis that it did not consider the final settlement funds to be amounts "recovered, refunded or credited" as a result of MAS' audit and analysis. R. Doc. No. 4, p. 2; Exhibit 10.

[4] The case initially began as a lawsuit filed by the City in the Civil District Court for the Parish of Orleans seeking a declaratory judgment that the City did not owe MAS a contingency fee pursuant to the parties' agreement for professional services. R. Doc. No. 1, Exhibit "A," Petition. Following removal to this Court, MAS filed its counterclaim seeking damages from the City for breach of contract as well as attorney fees for failure to pay debts due on open account. R. Doc. No. 28. As will be discussed more fully below, MAS also seeks a declaratory judgment that the City is obligated to pay MAS' contingency fee on all future payments received by the City as result of the final settlement between the City and BellSouth. *Id.* After filing its answer to MAS' counterclaim, the City sought voluntary dismissal of its declaratory judgment action. R. Doc. Nos. 31 and 32. The City's motion was granted by the Court on December 12, 2002. R. Doc. No. 36.

In its answer to MAS' counterclaim, the City asserted various affirmative defenses, including failure to state a claim upon which relief may be granted, prescription, laches, failure of cause and/or consideration, and failure to comply with the requirements of the agreement(s). R. Doc. No. 31. Conceding that there was no basis for maintaining such defenses, the City filed a motion to voluntarily dismiss the enumerated affirmative defenses. R. Doc. No. 56. The motion was granted by this Court on January 17, 2003. *Id.*

It is the City's position that MAS is not entitled to any contingency fee resulting from the City's final settlement with BellSouth insofar as the settlement funds are not amounts "recovered, refunded or credited" as a result of MAS' audit and analysis.[5] MAS disputes the City's allegations and argues that MAS' audit was the basis for the lawsuit which ultimately resulted in the final settlement between the City and BellSouth.[6] Accordingly, MAS contends that the settlement proceeds are funds recovered as a result of its audit and, therefore, it is entitled to its 20% contingency fee.[7] MAS further contends that it is entitled to recover the balance owed on its fixed fee for additional audit services rendered by MAS pursuant to the City's request which services were not part of the original contract.[8]

On March 17, 2003, a non-jury trial commenced which concluded on March 19, 2003. Upon consideration of the evidence adduced at trial, including the testimony of the witnesses and the admitted exhibits, the briefs and arguments of counsel, and the law, the Court makes the following findings of fact and conclusions of law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure.

I.

MAS is a corporation organized under the laws of the State of Texas with its principal place of business in

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[5] R. Doc. No. 86, Pretrial order, Material facts claimed by the City, p. 10.

[6] R. Doc. No. 96, MAS' Post-trial memorandum, p. 1.

[7] R. Doc. No. 96, MAS' Post-trial memorandum, p. 2.

[8] *Id.*

Houston, Texas.[9] The City is a municipality located in the Parish of Orleans, State of Louisiana, and organized under the laws of the State of Louisiana and the Home Rule Charter of the City of New Orleans.[10]

MAS was established by George White in 1987 as a company able to provide specialized franchise[11] and utility tax consulting services to municipalities.[12] Prior to establishing MAS, White had been employed in the Franchise Administration Department for the City of Houston where he acquired expertise in the field of utility tax franchises.[13] White's work for the City of Houston involved monitoring its utility franchise agreements, auditing such contracts, and developing strategies to renegotiate such contracts.[14] After White audited Southwestern Bell, the City of Houston was, based upon White's audit, able to increase Southwestern Bell's franchise fees by $10,000,000.00

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[9] R. Doc. No. 94, City's Proposed post-trial findings of fact and conclusions of law, ¶ 1.

[10] *Id.* at ¶ 2.

[11] As White explained:

> A franchise is an agreement between a City and a utility and/or cable company for the use of public right of way. Generally it provides compensation, as well as the standard and care of how the company would place its facilities within the public right of way as well as the rights of other citizens and others that may want to encroach upon those facilities.

R. Doc. No. 102, Corrected transcript, Testimony of White, p. 17.

[12] R. Doc. No. 98, Testimony of White, pp. 20-21.

Trial transcript, R. Doc. Nos. 98-100. All further references to the testimony of witnesses and to trial exhibits refer to R. Doc. Nos. 98-100, unless otherwise specified.

[13] *Id.* at pp. 16-20.

[14] *Id.* at p. 17.

annually in exchange for the City's agreement to release its claims.[15]

Recognizing that there were few persons outside of city government with utility franchise expertise, White then formed MAS.[16] Thereafter, MAS provided consulting and auditing services for approximately 100 municipalities, including the City of Atlanta, where a compliance audit of BellSouth's franchise fee payments was conducted.[17] In addition to his work experience, White has published several articles and spoken at several conferences about franchise fee issues.[18] In 1994, MAS sold certain of its assets to David M. Griffith and Associates, Ltd. ("DMG").[19] MAS, however, continued to transact some of its business in its own name.[20] DMG was subsequently acquired by MAXIMUS.[21]

In 1994, White was contacted by Brian Cain who was the Deputy Director of the Department of Utilities for the City.[22] At that time, the City lacked a comprehensive policy for dealing with the numerous telecommunications providers that wanted to do business with the City.[23] After meeting with Cain, MAS was initially engaged to provide technical assistance to a local contractor hired by the City

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[15] *Id.* at pp. 19-20.

[16] *Id.* at pp. 20-25.

[17] *Id.* at p. 23.

[18] *Id.* at pp. 26-27.

[19] R. Doc. No. 86, Pretrial order, Uncontested facts, ¶7 .gg.

[20] Testimony of White, pp. 46-47.

[21] *Id.*

[22] *Id.* at pp. 26-27.

[23] *Id.* at p. 28.

to develop an ordinance to address the issue, i.e. the Ordinance of General Applicability.[24] Soon thereafter, the Department of Utilities directed MAS to take the lead role on the ordinance development project.[25]

During the course of that project, White had numerous conversations with the Director of the Utilities Department, Lilliam Regan, and Cain regarding the City's franchise situation with BellSouth.[26] During these discussions, Regan and Cain expressed their dissatisfaction with BellSouth's franchise agreement and the City's desire to terminate it.[27] Thereafter, Cain requested that White provide a proposal for performing an audit of BellSouth's franchise payments to the City.[28]

In accordance with Cain's request, White provided a proposal that set forth the objectives and potential benefits of the proposed audit.[29] Among other things, White proposed to document how BellSouth interpreted the franchise payment provision in the current franchise agreement.[30] MAS also proposed to identify all revenues earned by BellSouth from services it provided the City and to determine whether such revenues were properly included or excluded from the franchise fee revenue calculation.[31] Recognizing the need for the BellSouth audit and

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[24] *Id.* at p. 29.

[25] *Id.* at p. 30.

[26] *Id.* at 31.

[27] *Id.* at pp. 32-37; Testimony of Regan, pp. 77-78.

[28] Testimony of White, pp. 36-37.

[29] *Id.* at pp. 37-39; Exhibits 6 and 7.

[30] *Id.*

[31] *Id.*

lacking the knowledge and expertise to perform the work on its own, the City decided to contract with MAS.[32]

The parties' agreement was formalized in a written contract styled, "Agreement for Professional Services" (the "contract") which was drafted by the City, approved by its legal department, and signed by Mayor Marc Morial.[33] The contract was "sourced" by the Department of Utilities, through Regan and Cain.[34]

At the time MAS contracted with the City, BellSouth's franchise fee payments to the City were made pursuant to an agreement executed by the City and BellSouth's predecessor in 1906 (the "1906 Agreement"), which obligated BellSouth to pay the City 3% of its gross receipts from "rental of telephones" in exchange for the exclusive right to provide telephone services within the City.[35] White was very familiar with this language and the issues arising from it as a result of his work for Florida municipalities which had the same language in their franchise agreements with BellSouth.[36]

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[32] Testimony of Regan, p. 73.

[33] Testimony of White, pp. 44, 143; Exhibit 10.

[34] Testimony of Regan, pp. 74-75.

[35] Testimony of White, p. 32; R. Doc. No. 86, Pretrial order, Uncontested facts, ¶ 7.d.

BellSouth's right-of-way to operate within the City was granted by an ordinance in 1879 (the "1879 Ordinance"). R. Doc. No. 86, Pretrial order, Uncontested facts, ¶ 7.z. BellSouth has always taken the position that the 1879 Ordinance does not require BellSouth to pay the City a fee in exchange for its right to do business in the City. Testimony of Leslie R.B. Ponder, pp. 243; Exhibit 110 at bates stamp MAS 0056-57.

[36] Testimony of White, pp. 32-33.

As a result of changes in the telecommunications industry, BellSouth eventually stopped renting telephones and BellSouth's obligation pursuant to the 1906 Agreement evolved into an agreement to pay the City 3% of BellSouth's gross annual revenues received from subscribers for local basic services.[37] In 1996, however, the City allegedly breached the 1906 Agreement by permitting other companies to provide telecommunications services within the City.[38]

Pursuant to the contract between MAS and the City, MAS agreed to review and analyze franchise fee payments paid to the City by BellSouth for the ten (10) year period of 1996 to 1987.[39] Specifically, the scope of MAS' services included the following particulars:

> I. *Scope of Services.*
>
> A. The Contractor Agrees To:
>
> 1. Perform a compliance review of franchise fee payments received by the City from [BellSouth] for a period of ten (10) years.
>
> 2. Review [BellSouth]'s franchise payment calculation in order to verify compliance with [BellSouth]'s current franchise agreement and applicable ordinance(s).
>
> 3. Identify all revenues earned by [BellSouth] within the franchise area and determine that such revenues are properly

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[37] Testimony of Ponder, pp. 213-15.

[38] *Id.* at pp. 216-17, 224.

[39] R. Doc. No. 86, Pretrial order, Uncontested facts, ¶ 7.b.

included or excluded from the franchise fee revenue calculation.

4. Determine if [BellSouth]'s revenue calculation and accounting practices and methodology are generally consistent with municipal standards.

5. Review present reporting practices of [BellSouth] in order to verify that adequate information is being submitted with each franchise fee payment made by [BellSouth] to the City.

6. Review in the internal financial and administrative controls of [BellSouth] as such relate to information processed and used in the compilation of franchise fees. Make a determination of the adequacy of such controls to ensure accurate and timely compliance with terms and conditions of the franchise agreement.

7. Prepare appropriate summary schedules outlining results based on revised calculation methods and/or additional information.

8. Retain project team subcontractor Graymond F. Martin, Professional Law Corporation to review the franchise agreement, payment terms, and related work as required. The subcontractor will be assigned projects representing twenty percent (20%) of the responsibility and total work. Terms and limitations of compensation are to be provided within the compensation section of this agreement.

9. From time to time solicit technical assistance from David M. Griffith & Associates, Ltd., if so needed.[40]

The contract did not obligate MAS to collect any amounts from BellSouth.[41]

In exchange for MAS' services, the parties agreed that MAS would be paid a fixed fee up to $100,000.00, plus a 20% contingency fee on any amounts "recovered, refunded or credited" from BellSouth as a result of MAS' audit and/or findings.[42] Specifically, the contract provided:

B. *COMPENSATION*

> The City shall compensate the Contractor [MAS] an amount not to exceed one hundred thousand dollars ($100,000) plus a contingency fee equal to twenty percent (20%) of any amounts recovered, refunded or credited. The subcontractor shall receive compensation for not more than twenty percent (20%) of the total compensation received under this contract.
>
> If the City receives nonmonetary compensation as a result of the audit and/or audit findings in the form of free or discounted equipment or services, the consultant shall receive a reasonable fee not to exceed twenty percent (20%) of the value of the

[40] Exhibit 10, pp. 2-3.

[41] See Exhibit 10.

[42] As will be explained in more detail below, although the provision does not specifically contain the language "as a result of the audit," there is no dispute that MAS' contingency fee was limited to funds recovered from BellSouth as a result of MAS' audit and/or work.

> nonmonetary compensation. In any event, the total amount paid shall not exceed one hundred thousand dollars ($100,000) plus twenty percent (20%) of the amount acknowledged by the City as being due as a result of the audit.[43]

Of significance to the issues in this case, the contract also included the following provision:

> WHEREAS, the results of the compliance review will strategically place the City in a better position to renegotiate the existing franchise . . .[44]

After entering into this contract, the City informed BellSouth by correspondence drafted by MAS and dated January 8, 1996, of its intent to audit its franchise fee payments.[45] BellSouth initially objected to the City's request to conduct the compliance review.[46] Primarily, "BellSouth objected to any type of contractual arrangement between the City and MAS on a contingency basis."[47] At the City's request, MAS researched and prepared written responses to BellSouth's objections and attended meetings with representatives of the City and BellSouth which were held to resolve BellSouth's objections to the compliance review.[48] In a March 15, 1996 letter, the City formally responded to BellSouth's objections and directly

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[43] Exhibit 10, p. 4.

[44] *Id* at p. 1.

[45] Exhibit 13; Testimony of Carolyn Grant, pp. 206-07.

[46] Testimony of White, pp. 60-62; Testimony of Grant, p. 208; Testimony of Morial, p. 145.

[47] Testimony of Grant, p. 208. See also, Testimony of White, pp. 60-62; Testimony of Morial, p. 145.

[48] R. Doc. No. 86, Pretrial order, Uncontested facts, ¶ 7.e.

rejected BellSouth's contention that the City could not retain professional services on a contingency fee basis. The City stated:

> Other than a vague reference to the jurisprudence of other jurisdictions, [BellSouth] cites no authority for its third assertion, that the contingency fee arrangement under which MAS is operating is unfair and causes the reviewer to be biased. There is no prohibition of this type of arrangement in Louisiana, nor is it recognized as unfair or a violation of public policy.[49]

The City's response to BellSouth's objections also stated that the renegotiation of the existing franchise between BellSouth and the City was "not the purpose of the review, but merely a result that may be achieved."[50]

During the period within which BellSouth refused to provide its records to MAS, i.e., from January, 1996, to June, 1996, MAS employee Carolyn Grant researched and analyzed Public Service Commission records and other public information to illustrate the amount of money that was at stake in the ten year audit.[51] Her preliminary research showed that BellSouth had underpaid the City as much as approximately $17,000,000.00 during the ten

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[49] Exhibit 23, p. 2.

[50] *Id.* at p. 1.

[51] Testimony of White, pp. 61-64; Testimony of Grant, pp. 208-14; Exhibit 31.

year period.[52] Grant reported her preliminary findings to the City in an August 27, 1996 letter.[53]

On October 9, 1996, Mayor Morial wrote to BellSouth's president, Herschel Abbott, to request, *inter alia*, that BellSouth comply with the City's request to provide records for MAS' review.[54] Using Grant's preliminary findings, Mayor Morial also asserted that, contrary to its prior representation to the City, BellSouth had improperly excluded certain revenue accounts[55] from its franchise fee calculations.[56] As Carolyn Grant explained:

> In its presentation to the City Council, BellSouth had provided the revenue accounts that they include in the base to pay the City. Upon review of their testimony, when I looked at their records they were not including all of the revenue sources.[57]

Prior to MAS' preliminary findings, no one at the City had any knowledge of the existence of these revenue accounts or of the fact that BellSouth was not complying with what it had told the New Orleans City Council.[58] In

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[52] Testimony of White, pp. 62-64; Testimony of Grant, p. 214; Exhibit 33.

[53] Exhibit 131.

[54] Exhibit 33.

[55] As White explained, local exchange telephone companies like BellSouth are required to use certain accounts/categories of revenues to report their revenue sources. Testimony of White, p. 63.

[56] Exhibit 33, p. 2.

[57] Testimony of Grant, p. 212.

[58] Testimony of Grant, pp. 212-13; Testimony of White, p. 63;

fact, prior to MAS' audit, the City had no knowledge of how BellSouth calculated its franchise fee payments.[59]

In his October 9, 1996 letter, Mayor Morial made BellSouth aware of these findings and requested that BellSouth remit the amount of underpayments shown by Grant's preliminary analysis.[60] The Mayor acknowledged that the 1906 franchise agreement pursuant to which BellSouth and the City had been operating was outdated and he requested that negotiations begin immediately toward a new franchise agreement. Specifically, Mayor Morial stated:

> The existing Franchise Agreement does not include provisions that reflect the economies and technology of the 21st century. The City requests that [BellSouth] remit all underpaid amounts resulting from MAS' review, approximately $17,358,073. Additionally, it is requested that negotiations commence immediately toward a new franchise agreement that will include provisions indicative of today's environment and the forever evolving future.[61]

Following Mayor Morial's letter setting forth MAS' findings, BellSouth withdrew its objections to the audit and provided MAS with access to its records.[62]

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[59] Testimony of White, pp. 38, 107; Testimony of Grant, pp. 212-15, 230-33.

[60] *Id.* at pp. 2-4.

[61] Exhibit 33, p. 4.

[62] R. Doc. No. 86, Pretrial order, Uncontested facts, ¶ 7.g.; Testimony of Grant, p. 217.

As agreed upon in the contract, MAS analyzed BellSouth's payments pursuant to the 1906 Agreement for the period 1987 through 1996.[63] Following its analysis, MAS presented its findings to the City in a written report dated September 5, 1997.[64] In its report, MAS concluded that BellSouth had not paid the City in accordance with BellSouth's own methodology and procedures which resulted in an underpayment of approximately $589,392.00 for the ten-year review period.[65] MAS further concluded that BellSouth had excluded certain categories of revenue from the base it used to calculate the City's payments, resulting in underpayments to the City of approximately $20,236,949.00 for the ten-year review period.[66]

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[63] R. Doc. No. 86, Pretrial order, Uncontested facts, ¶ 7 .h.

[64] *Id.*; Testimony of Grant, p. 218; Exhibit 49.

[65] R. Doc. No. 86, Pretrial order, Uncontested facts, ¶ 7.h.; Exhibit 49.

[66] *Id* Specifically, MAS summarized its conclusions as follows:

> BellSouth did not include all revenue categories in the base used to calculate the City's franchise fee payments as required by the franchise agreement. Specifically, the company excluded revenue derived from miscellaneous revenue (over earnings), public telephone, local private line, customer premises equipment, other local exchange, network access, long distance, directory advertising, miscellaneous regulated and nonregulated charges. This caused the City to be underpaid approximately $20,236,949 for the audit period.
>
> In its June 12, 1997 letter to the City, BellSouth provided the revenue accounts included and excluded from the City's franchise fee calculation. An analysis of actual payments made revealed that BellSouth did not pay the City according to the company's stated methodology. Therefore, the City was underpaid approximately $353,635 for the period 1991 through 1996 and approximately $589,392 for the audit period.

(Continued on following page)

MAS' September, 1997, report was issued as a "draft report" because its procedure called for the issuance of a draft report that MAS could review with the City and then with BellSouth during an "exit interview."[67] After the exit interview with BellSouth, a final report was to be issued.[68] In accordance with its procedure, MAS requested authority to conduct an exit interview with BellSouth on several occasions, but the City did not respond to MAS' requests.[69]

By letter dated November 10, 1997, the City thanked MAS for its work, stating that it "extends the deepest gratitude for the work that was performed . . ."[70] In its letter, the City also confirmed its understanding that MAS could not finalize its report until it conducted an exit interview with BellSouth.[71] Nevertheless, despite this understanding, the City continued to disregard MAS' requests for an exit interview.[72] MAS soon thereafter

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Exhibit 49 at bates stamp MAS 1198.

[67] Testimony of White, p. 65-66. As White explained:

> Our standard procedure when conducting these engagements is that we will issue a draft report to our client for their review and comment. Then we would meet with BellSouth to go through our report, to get their reaction to our findings and issues we've raised, and after the benefit of that discussion we would go to final report.

Id.

[68] *Id*; Testimony of Grant, pp. 218-19.

[69] Testimony of White, p. 66; Testimony of Grant, pp. 218-21.

[70] R. Doc. No. 86, Pretrial order, Uncontested facts, ¶ 7.j.; Exhibit 51.

[71] Exhibit 51.

[72] Testimony of White, pp. 66-68.

learned that Mayor Morial had initiated negotiations with BellSouth on his own.[73]

During his negotiations, Mayor Mortal informed BellSouth of the City's intent to pursue collection of the underpayments set forth in MAS' draft report.[74] Although BellSouth denied liability for the City's audit claim, it agreed to pay the City the sum of $2,500,000.00 as a partial settlement.[75] On August 3, 1998, the City and BellSouth executed an agreement styled, "Partial Settlement and Mutual Agreement for Credit Payment," pursuant to which BellSouth agreed to pay the City $2,500,000.00 without admitting any liability for the underpayments discovered in MAS' audit.[76] Specifically, the partial settlement provided in pertinent part:

> WHEREAS, there is a dispute between the City of New Orleans and BellSouth regarding the services on which BellSouth pays the 3% payment owed under the 1906 Agreement; and
>
> WHEREAS, the City has undertaken an audit of BellSouth to verify the payments under the 1906 Agreement; and
>
> WHEREAS, the parties have a dispute as to whether additional payments are due by BellSouth to the City for the period in question and, therefore;

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[73] *Id* at p. 68, 72-73.

[74] Testimony of Morial, pp. 136-37; R. Doc. No. 86, Pretrial order, Uncontested facts, ¶ 7.k.

[75] *Id.*

[76] R. Doc. No. 86, Pretrial order, Uncontested facts, ¶¶ 7.l- .m.; Exhibits 160 and 183.

> IT IS AGREED that BellSouth shall pay, upon execution of this agreement, the sum of $2.5 million dollars to the City, and
>
> IT IS FURTHER AGREED that the payment of $2.5 million shall be non-refundable, but shall operate as a credit against any settlement reached between the parties of the audit or against any final judgment obtained by the City against BellSouth concerning the audit.
>
> IT IS FURTHER AGREED that the City reserves its rights to seek additional sums from BellSouth that may be due pursuant to the 1906 Agreement and that BellSouth reserves its right to contest that any sums are due for the period in question . . . Further, the parties agree that the execution of this Agreement does not in any way constitute an admission of any nature whatsoever by or on behalf of any party . . .[77]

On August 4, 1998, BellSouth paid the City the sum of $2,500,000.00 pursuant to the partial settlement.[78] Thereafter, on numerous occasions from August, 1998, to April, 2001, MAS requested payment of its 20% contingency fee, i.e., $500,000.00, on the proceeds from the partial settlement.[79] Specifically, MAS made written requests for payment of its contingency fee on August 14, 1998, October 20, 1998, December 18, 1998, April 30, 1999, June 2, 1999, July 12, 1999, October 22, 1999, December 6, 1999, January 28, 2000, December 13, 2000, and December 29,

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[77] Exhibit 183.

[78] R. Doc. No. 86, Pretrial order, Uncontested facts, ¶7 .m.

[79] R. Doc. No. 86, Pretrial order, Uncontested facts, ¶ 7.n.; Exhibits 53, 54, 55, 58, 60, 65, 66, 67, 70, 92, 95.

2000.[80] During that period, the City repeatedly confirmed its intent to pay MAS' fee.[81] The City never gave MAS any reason for its failure to remit payment on a timely basis, but repeatedly assured MAS, to no avail, that payment was forthcoming.[82]

By letter dated April 10, 2000, signed by Anthony Drake[83] on behalf of MAS, and Mayor Morial, MAS and the City agreed that MAS would accept a reduction of its contingency fee if the City agreed to remit payment on or before certain specified dates.[84] More specifically, MAS agreed to accept a reduced contingency on the proceeds received pursuant to the partial settlement if a payment of $400,000.00 was received by September 21, 2000.[85] MAS further offered to reduce its contingency fee to 15% on the final settlement with BellSouth if the City paid MAS "in three equal installments in each of the three months following the first payment or credit" from BellSouth.[86]

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[80] *Id.*

[81] Testimony of White, pp. 74-75; Exhibits 54, 58, 60, 65, 66, 67, 70, 92, 95.

[82] Testimony of White, pp. 74-75.

[83] Anthony Drake is president of Unison MAXIMUS, a wholly owned subsidiary of MAXIMUS, Inc. Testimony of Drake, pp. 4-5. Because of Drake's business relationship with Mayor Morial, George White requested his assistance in obtaining payment from the City on behalf of MAS. *Id.* at p. 6.

[84] R. Doc. No. 86, Pretrial order, Uncontested facts, ¶ 7.o.; Exhibit 74.

[85] *Id.*

[86] *Id.*

The City did not comply with the terms proposed by MAS.[87]

In April, 2000, the City paid MAS the sum of $50,000.00 on the reduced $400,000.00 fee. The $350,000.00 balance, which the City agreed to pay by September 21, 2000, was not paid until June, 2001, which was almost three years after the partial settlement.[88] Although the City did not meet the conditions upon which MAS offered to reduce its fee on the partial settlement, MAS nevertheless accepted the payment of $400,000.00, and it does not seek any additional compensation from this partial settlement with BellSouth.[89]

Prior to the above payments being made to MAS, the City, in April, 1999, requested that MAS perform an additional audit of BellSouth's franchise fee payments for the years 1997 and 1998.[90] Mayor Morial authorized this additional work and requested MAS to complete it within 90 days.[91] He further directed MAS to work out the details required to do that work with Regan.[92] Although MAS was reluctant to do any further work for the City in light of the City's continued failure to pay its contingency fee on the

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[87] Testimony of White, p. 79; Testimony of Drake, pp. 9-10. Testimony of White, pp. 78-79.

[88] R. Doc. No. 86, Pretrial order, Uncontested facts, ¶ 7.p. The Court notes that although the first $50,000.00 check was made payable to MAS, the City wrote the $350,000.00 check to DMG/Maximus, Inc. See Exhibits 138A and 138.

[89] Testimony of White, pp. 78-79.

[90] R. Doc. No. 86, Pretrial order, Uncontested facts, ¶ 7.q

[91] Testimony of White, p. 82; Testimony of Grant, p. 229; Testimony of Regan, pp. 82-83.

[92] *Id.*

partial settlement,[93] MAS eventually agreed to perform these additional services for a $40,000.00 fixed fee in addition to MAS 20% contingency fee on any amounts recovered as per the terms of the original contract.[94] As Regan testified:

> A. . . . George was reluctant at that time to do any further work for the City, but was amenable to do so if we met certain payments. And that included this $40,000 payment.
>
> Q. Plus a contingency fee?
>
> A. Yes . . .[95]

In an October 22, 1999 letter to Regan which was carbon copied to the Mayor and the City Attorney,[96] MAS set forth the parties agreement as to payment of these additional fees:

> As per our letter dated July 12, 1999, we will not perform any additional work for the City unless the City pays our direct expenses estimated to total $40,000. Enclosed is our invoice for $9,510.03. The balance due is $30,489 . . . plus 20% of any amounts collected as per the terms of the original contract.[97]

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[93] Testimony of Regan, p. 83.

[94] Testimony of White, pp. 82-83; Testimony of Regan, pp. 83, 103.

[95] Testimony of Regan, p. 83.

[96] At the time of these events, the City Attorney was Avis Russell. Exhibit 66; Testimony of Regan, p. 75.

[97] Exhibit 66; see also Exhibit 65, Letter from White to Regan stating, "We are not willing to perform any additional work on this project unless the City agrees to pay some of our direct expenses

(Continued on following page)

At trial, Regan confirmed the parties agreement to that effect. Regan testified:

> THE COURT: . . . Was it your understanding that for this 1997 to 1998 audit extension, so to speak, of the franchise that MAS was to be paid $40,000 for two additional years plus a contingency of 20 percent of any amounts collected as per the terms of the original contract?
>
> THE WITNESS: That is correct, your Honor.
>
> * * *
>
> THE COURT: Was the City anxious to get this audit update?
>
> THE WITNESS: Absolutely, your Honor. And it was at the suggestion of the mayor that we did it at that time in conversations with him because we needed new numbers, we needed to bring it forward and see what had happened. It was always treated as an integral part of what we were doing.
>
> THE COURT: Following your receipt of those letters . . . and you saw the carbon copies. Were you ever told by anyone that MAS should not be paid the $40,000 for the update?
>
> THE WITNESS: Never. And, your Honor, if I may, that the only reason why I could deal with coming here today, besides the subpoena, was because I felt that George White always acted

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associated with this project. We estimate our direct cost to update the Bell South audit for two additional years total $40,000 plus a contingency of twenty (20%) of any amounts identified."

with the City in an honorable fashion, and I wanted to reciprocate.[98]

Regan further testified that Mayor Morial was aware of the partie's agreement and approved the payment of the additional fees:

> Q. What did Mayor Morial say about the 40,000?
>
> A. I need[ed] his help in trying to allocate the 40,000, to move them into the budget, that's all. So I would have needed for him to call the CAO and say, look, this is something I need to get done.
>
> Q. Was he willing to do so?
>
> A. Mayor Morial believed in what I was doing with this and he helped me whenever I had something.[99]

Consistent with the partie's agreement, in November, 1999, the City paid MAS the sum of $9,510.00 as requested in MAS' October 22, 1999, letter for its work on the 1997-1998 audit.[100] The $30,490.00 balance owed on MAS' fixed fee for the 1997-1998 audit remains unpaid.[101]

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[98] Testimony of Regan, pp. 103, 108.

[99] Testimony of Regan, p. 88.

[100] Testimony of White, p. 83; Testimony of Regan, pp. 83-84, 103; Exhibit 138.

[101] Testimony of White, p. 83.

As requested by the City, MAS performed the audit for the 1997-1998 period.[102] MAS initially refused to release its report for the 1997-1998 period due to the City's failure to honor its payment obligations to MAS.[103] In January, 2000, Regan requested that White release the report because the Mayor wanted to take action to collect from BellSouth.[104] Although White persisted in his refusal to release the report until MAS was paid, White agreed, upon Regan's request, to at least provide the City with the amount of underpayments that MAS found when it conducted the 1997-1998 audit.[105]

By letter dated January 20, 2000, the City, based upon the amounts disclosed by White, demanded additional payments from BellSouth for the 1997-1998 period.[106] On February 9, 2000, BellSouth notified the City that it was refusing to pay the sums demanded by the City.[107] Due in part to the City's refusal to authorize a meeting in which MAS could present its findings to BellSouth, BellSouth objected to the City's demand letter.[108]

In July, 2000, White received another telephone call from Regan in which she stated that the City urgently needed the 1997-1998 audit report because it intended to

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[102] R. Doc. No. 86, Pretrial order, Uncontested facts, ¶ 7.s.; Testimony of Grant, p. 228.

[103] Testimony of White, p. 89; Testimony of Grant, p. 228.

[104] Testimony of White, p. 84.

[105] *Id.*

[106] Testimony of White, p. 84; Exhibit 68.

[107] R. Doc. No. 86, Pretrial order, Uncontested facts, ¶ 7.u.; Exhibit 71.

[108] Exhibit 71.

file a lawsuit against BellSouth.[109] After receiving additional assurances that the City would pay MAS its fees, including written confirmation,[110] MAS agreed to release its report on the 1997-1998 audit.[111]

MAS issued its report for the 1997-1998 compliance review by letter dated July 20, 2000.[112] MAS reported that BellSouth had excluded thirteen revenue accounts from the revenue base from which BellSouth calculated its franchise fee payments. BellSouth's exclusion of these revenue accounts resulted in underpayments in excess of $5,000,000.00 for the 1997-1998 period.[113]

MAS performed all of its obligations pursuant to the contract.[114] Although MAS assisted the City in its efforts to collect monies from BellSouth, the contract did not require

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[109] Testimony of White, p. 85.

[110] The City's intent to pay MAS its fees upon release of its audit report was memorialized in the City's letter of July 20, 2000, wherein Regan wrote:

> In conjunction with your release of the above report, the City intends to meets its obligations under the terms of the 1995 contract between the City and MAS and the let[t]er dated April 10, 2000 signed by Mayor Morial. I understand that by providing the requested report MAS is not waiving the City's obligations to pay MAS.

Exhibit 78.

[111] Testimony of White, p. 89; Exhibit 79.

[112] R. Doc. No. 86, Pretrial order, Uncontested facts, ¶ 7.s.; Exhibit 79.

[113] *Id.*

[114] Testimony of Morial, p. 199. In fact, the City conceded that MAS performed all of its obligations under the contract when it moved to dismiss its affirmative defense of "failure to comply with the requirements of the agreement." R. Doc. No. 56. That motion was granted on January 17, 2003.

MAS to collect from BellSouth.[115] The City never informed MAS that it was dissatisfied with MAS' work or that it had failed to perform any of its obligations.[116]

In a letter dated July 20, 2000, the City advised MAS that it had "hired a law firm to pursue monies due to the City from BellSouth pursuant to the original audit conducted by MAS . . . as well as the subsequent audit for 1997 and 1998."[117] In its letter, the City also requested that MAS assist the City's litigation team "to facilitate the City's receipt of funds from BellSouth" and it promised to "make every effort to pay MAS from the first payment received from BellSouth and any remaining balance due to MAS from the next succeeding payments."[118]

On July 25, 2000, the City filed suit against BellSouth alleging that BellSouth had failed to fully remit its payments pursuant to the 1906 Agreement for the periods reviewed by MAS, i.e., 1987-1996 and 1997-1998.[119] The City sought payment from BellSouth based upon MAS' findings and analysis.[120]

After removing this lawsuit to federal court, BellSouth filed an answer and counterclaim on September 6, 2000.[121]

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[115] See Exhibit 10.

[116] Testimony of White, p. 75; R. Doc. No. 86, Pretrial order, Uncontested facts, ¶ 7.t.

[117] R. Doc. No. 86, Pretrial order, Uncontested facts, ¶ 7.v.; Exhibit 78.

[118] Exhibit 78.

[119] R. Doc. No. 86, Pretrial order, Uncontested facts, ¶ 7.v.; Exhibit 81.

[120] *Id.*

[121] R. Doc. No. 86, Pretrial order, Uncontested facts, ¶ 7 .w.; Exhibit 83.

In its counterclaim, BellSouth sought a declaratory judgment that the 1906 Agreement was no longer in effect because its obligations there under were predicted on its right to remain the exclusive provider of telecommunications services within the City.[122] BellSouth also sought an order requiring the City to refund all monies paid pursuant to the 1906 Agreement which refund was to begin at the time that the City authorized other companies to provide telecommunication services in the City.[123] The City's counsel, Randall Smith, Esq., provided a copy of BellSouth's answer and counterclaim to White by letter dated September 8, 2000.[124]

The risk that BellSouth would file a counterclaim challenging the validity of the 1906 Agreement was recognized by City officials prior to the litigation.[125] Regan testified that BellSouth had mentioned the termination of the 1906 Agreement "from time to time over the years."[126] Likewise, White stated:

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[122] *Id.*

[123] *Id.* The amount of refund sought from the City was approximately $18,000,000.00. Testimony of Ponder, p. 46.

[124] Testimony of White, p. 93; Exhibit 84.

[125] Testimony of White, pp. 91-92; Testimony of Regan, pp. 98-99. While Mayor Morial testified that he was purportedly surprised at BellSouth's counterclaim, Testimony of Morial, pp. 128-29, the likelihood that BellSouth would challenge the validity of the franchise agreement was recognized by White and City officials in discussions as early as 1996 or 1997. Testimony of White, pp. 91-92; Testimony of Regan, pp. 98-99.

[126] Testimony of Regan, pp. 98-99. In contrast, the former City Attorney, Mavis Early, was not involved in Regan's dealings with BellSouth, and Early was unaware of BellSouth's position with respect to the 1906 Agreement until the City filed the lawsuit. Testimony of Early, pp. 47-48.

> Q. . . . Were you surprised by [BellSouth's counterclaim]?
>
> A. No, not at all.
>
> Q. Why not?
>
> A. Based upon our experience and discussions that we had had with the City years earlier, that's generally what would be expected, that they would counter sue and claim the franchise was invalid and try to get the fees impounded to the Court to penalize the City.[127]

White further testified that the foregoing discussions occurred with Regan, Cain and perhaps then City Attorney, Avis Russell.[128]

Although Mayor Morial may not have had notice of the particular legal arguments that BellSouth would raise in its counterclaim, he testified that he knew that the 1906 Agreement could be questioned[129] and that BellSouth's president, Herschel Abbott, warned him that BellSouth would "go to court" against the City if the City filed suit.[130] Mayor Morial further testified that he believed BellSouth would have challenged the validity of the 1906 Agreement, even if the City had not filed the lawsuit:

> I think had the audit not come along, that in all likelihood, what would have occurred is that we would have been faced with the lawsuit in the

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[127] Testimony of White, pp. 91-92.

[128] *Id.* at p. 92.

[129] Testimony of Morial, p. 129.

[130] *Id.* at pp. 126-27.

> form of BellSouth's counterclaim at some point. In other words, they would have judicially challenged at some point, the validity of the 1906 Agreement without the audit, . . . they would have either done that or they would have gone to the legislature and tried to get a Simplified Tax Plan to supercede the 1906 Agreement.[131]

Similarly, Mayor Morial testified:

> If [the City] had not filed the lawsuit, we would have probably been right where we were before or potentially on the receiving end of a lawsuit by BellSouth to cancel the 1906 Agreement. Or, in a situation where BellSouth was paying their franchise fee into the registry of the court where the City couldn't use it for its budgetary needs.[132]

On October 6, 2000, the City filed its answer to BellSouth's counterclaim in which the City generally denied all of BellSouth's allegations and claims for relief.[133] Thereafter, in November, 2000, the City and BellSouth commenced negotiations to settle the litigation.[134]

Pursuant to the City's request, MAS provided services to the City in connection with its lawsuit and settlement negotiations.[135] Unlike the City, MAS understood BellSouth's revenue accounting and had substantial experience

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[131] *Id.* at p. 181.

[132] Testimony of Morial, p. 143.

[133] R. Doc. No. 86, Pretrial order, Uncontested facts, ¶ 7.x.; Exhibit 85.

[134] R. Doc. No. 86, Pretrial order, Uncontested facts, ¶ 7.x.

[135] *Id* at ¶ 7.y.

in similar audit settlements involving BellSouth.[136] White specifically advised the City that BellSouth would not want to acknowledge any liability for the audit claims.[137] Therefore, based on his experience, White advised the City that one of the ways to reach a settlement was to structure it such that BellSouth would not have to admit liability.[138] White suggested three ways in which the settlement could be structured to recover monies from BellSouth: 1) imposing a fee per access line; 2) payment of a fixed annual sum; or 3) payment of a percentage of gross receipts.[139]

The City's attorney forwarded all of BellSouth's settlement proposals to MAS for its review and comments.[140] MAS representatives also attended settlement meetings with City and BellSouth representatives to discuss settlement options.[141]

By letter dated January 9, 2001, BellSouth submitted an offer to the City of an annual fixed payment of $5,000,000.00 for five (5) years.[142] As stated in its cover letter, BellSouth "incorporated [the City's] suggestion of a fixed annual payment to be made over the next five years."[143] BellSouth's offer also included the parties'

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[136] *Id* at p. 95. Specifically, White had prior experience with similar audit settlements involving Southwestern Bell in Texas. *Id* at pp. 162-63.

[137] *Id.* at pp. 162-64.

[138] Testimony of White, pp. 162-63; see also Testimony of Grant, p. 272.

[139] Testimony of White, pp. 179-80.

[140] R. Doc. No. 86, Pretrial order, Uncontested facts, ¶ 7.y.

[141] *Id*

[142] Exhibit 153.

[143] Exhibit 153.

recognition that the 1906 Agreement had terminated due to the fact that other companies had acquired the right to provide telecommunication services within the City.[144]

On January 11, 2001, a settlement meeting was held to discuss BellSouth's settlement offer. The meeting was attended by White, Grant, Regan, Early, Mayor Morial, and Randall Smith, Esq.[145] MAS' audit findings were discussed at the January 11 meeting.[146] At the conclusion of the meeting, MAS was asked by the City to prepare an analysis of BellSouth's settlement proposal in light of MAS' audit findings.[147]

On January 16, 2001, MAS forwarded its settlement analysis to Smith and Regan.[148] MAS' analysis evaluated BellSouth's offer and also set forth various counteroffers that the City could make in light of the audit findings. The counteroffers ranged from a fixed annual payment of $5,500,000.00 over a period of six years to $7,000,000.00 over a period of seven years.[149] On January 29, 2001, MAS' settlement analysis was forwarded by Smith to Mayor Morial.[150]

Throughout this time, the $350,000.00 balance on MAS' contingency fee from the 1998 partial settlement

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[144] Exhibit 153, ¶ 3.2.

[145] Testimony of White, pp. 109-10; Exhibit 96.

[146] Testimony of White, p. 110.

[147] Testimony of White, pp. 111-12; Exhibits 101 and 103.

[148] Exhibit 101.

[149] *Id.*

[150] Exhibit 103.

with BellSouth continued to remain unpaid.[151] By letter dated April 17, 2001, White wrote the Mayor requesting payment of that balance and further reiterating the parties' agreement with respect to the additional work MAS was asked to perform to update the audit findings for 1997 and 1998.[152] Making reference to the pending settlement negotiations between the City and BellSouth, the letter also stated that, "[w]hile the MAS contract provides for a twenty percent (20%) contingency fee amount, . . . , MAS is prepared to accept a reduction of its fee to fifteen percent (15%)." There is no evidence that the City responded to White's letter.

On July 30, 2001, Grant attended a small fundraiser, i.e., approximately 20-30 people, for Mayor Morial.[153] MAS' primary reason for having one of its representatives attend the fundraiser was to have an opportunity to meet with Mayor Morial and discuss the status of settlement negotiations between the City and BellSouth.[154] Grant testified at trial that she was able to speak with the Mayor at the reception and that he informed her that the City and BellSouth had reached a tentative settlement for a fixed annual payment of $5,500,000.00 for six years.[155] Grant further testified that the Mayor expressed the City's commitment to pay MAS its contingency fee on the final

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[151] MAS was not paid the remaining $350,000.00 balance on its contingency fee from the partial settlement until June 14, 2001. Exhibit 138.

[152] R. Doc. No. 86, Pretrial order, Uncontested facts, ¶ 7.aa.; Exhibit 116.

[153] Testimony of Grant, p. 242; Exhibit 124.

[154] Testimony of Grant, p. 242; Exhibit 125.

[155] Testimony of Grant, p. 243-44.

settlement, but that he wanted to discuss a discount on the amount that was due.[156] Although Mayor Morial denied Grants's recollection of the alleged conversation,[157] Grant's testimony was corroborated by significant evidence. Specifically, it was corroborated by the testimony of Drake, to whom Grant reported her conversation, in an August 14, 2001 letter to Mayor Morial that summarized Grant's conversation with the Mayor,[158] as well as a copy of the invitation to the fundraiser.[159] While the Court has the utmost respect for Mayor Morial, it finds the testimony of Carolyn Grant to be credible and supported by the evidence.

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[156] *Id.*

[157] Specifically, Mayor Morial testified that he did not recall the July 30, 2001 fundraiser. Testimony of Morial, p. 187. Nevertheless, Mayor Morial denied the conversation because he testified that it would have been rare to have a 15 or 20 minute conversation at a fundraiser at the Audubon Tea Room attended by "upwards to 1,000 people." *Id.* at 176, 186-91. Yet, the evidence, including the invitation to the fundraiser, establishes that the conversation occurred at a small $1,250.00 per person event at the Bank One Building. Exhibit 124, Testimony of Grant, pp. 242-43.

[158] Specifically, in the August 14, 2001 letter to Mayor Morial, MAS confirmed its understanding of the City's commitment to pay MAS' contingency fee, stating:

> On July 30, 2001, you mentioned to Carolyn Grant (MAXIMUS) that 1) it was your Intent to pay MAS an installment amount upon receipt and execution of the settlement agreement and 2) you wanted to negotiate our payment amount.

Exhibit 127.

Significantly, no City representative ever contacted MAS to question or dispute the accuracy of the foregoing statement regarding Mayor Morial's commitment to pay MAS' fee. Testimony of Grant, pp. 246; Testimony of Drake, p. 15.

[159] Testimony of Grant, pp. 242-45; 265-66; Testimony of Drake, pp. 12-15; Exhibit 127.

Through October, 2001, MAS continued to assist the City and its attorneys in their settlement negotiations with BellSouth.[160] On October 17, 2001, the City and BellSouth settled their lawsuit pursuant to a written settlement agreement.[161] The final settlement agreement resolved and released all claims asserted in the litigation, including the City's claims against BellSouth for monies owed based upon MAS' analysis.[162] The terms of the settlement agreement obligated BellSouth to pay the City a fixed annual sum of $5,500,000.00 for six years, the very same settlement structure proposed by MAS in its settlement analysis to the City.[163] Specifically, the settlement agreement provided in pertinent part:

> WHEREAS, the City has instituted litigation against BellSouth, alleging that BellSouth owes additional monies under various agreements between BellSouth and the City as discussed more fully herein;
>
> WHEREAS, BellSouth has filed a counterclaim in such litigation, alleging that such agreements have terminated and that BellSouth is due certain refunds;
>
> WHEREAS, the Parties have previously entered into an agreement to compromise and settle the claims by and disputes between the Parties;

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[160] Testimony of White, pp. 117, 127-29; Exhibits 110, 114, 128, 129 at bates stamp MAS 4663;

[161] R. Doc. No. 86, Pretrial order, Uncontested facts, ¶ 7.bb.; Exhibit 137.

[162] Exhibit 137; R. Doc. No. 86, Pretrial order, Uncontested facts, ¶ 7.bb.

[163] Testimony of White, pp. 179-82; Exhibits 101, 103, and 137.

* * *

Existing Disputes. Prior to the date hereof, there have existed certain disputes, claims and causes of action by and between BellSouth and the City relating to the liability of BellSouth for remitting certain amounts to the City in compliance with the 1906 Agreement. BellSouth and the City have asserted such disputes in the Pending City Suit.[164]

Intent and Purpose. This Agreement is intended to fully and completely compromise, settle and finally terminate all of the disputes, claims and causes of action by and between BellSouth and the City with respect to the agreements and ordinances described herein and in the Pending City Suit.

* * *

In addition to the $2,500,000.00 that BellSouth has previously paid to the City pursuant to the Partial Settlement and Mutual Agreement for Credit Payment dated August 3, 1998, and in lieu of the payments pursuant to the 1906 Agreement, BellSouth shall pay to the City a fixed annual amount of FIVE MILLION, FIVE HUNDRED THOUSAND AND 00/100 DOLLARS ($5,500,000.00) for six (6) years . . .

* * *

[164] The agreement stated that the "'Pending City Suit' shall mean City of New Orleans v. BellSouth Telecommunications, Inc., Civ. Action No. 00-2340, Section T, United States District Court Eastern District of Louisiana, including all claims and causes of action alleged by either Party therein." Exhibit 137 at p. 2.

> Because this Agreement fully and finally settles and compromises all claims and actions asserted by the Parties in the Pending City Suit, BellSouth and the City shall, . . . , take all actions necessary to dismiss the Pending City Suit, with prejudice.[165]

The settlement agreement also provided that "because other persons or companies have acquired the right to conduct a telephone exchange or business in the City," the 1906 Agreement was no longer in effect.[166] The parties further agreed that Mayor Morial would support simplified tax legislation requiring payments to the City from all telecommunications providers within the City.[167] Passage of such legislation would provide additional revenues to the City (significantly greater than the revenues received by the City pursuant to the 1906 Agreement) because it provides for payments from all telecommunications providers within the City.[168] If the legislation is not enacted prior to January, 2007, BellSouth and the City agreed that the City could elect to enter into a new franchise fee agreement, referred to as the "LMA Agreement," pursuant to which it would recoup essentially the same revenue that it had received under the 1906 Agreement.[169] BellSouth agreed that it would continue the $5,500,000.00 annual payments through 2006 even if the simplified tax legislation was enacted during the interim.[170] It appeared to

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[165] Exhibit 137, pp. 1-2

[166] Exhibit 137, p. 2.

[167] R. Doc. No. 86, Pretrial order, Uncontested facts, ¶¶ 7.cc-.dd.

[168] Testimony of White, pp. 120-21; Testimony of Morial, p. 133; Testimony of Ponder, p. 237; Exhibit 175.

[169] Testimony of Ponder, p. 233; Exhibits 114 and 137.

[170] Testimony of Ponder, p. 111-13.

counsel for BellSouth that Mayor Morial was particularly pleased with that aspect of the settlement agreement.[171]

To date, BellSouth has satisfied its payment obligations pursuant to the final settlement agreement and it has paid the City $16,500,000.00, i.e., $5,500,000.00 per year in 2001, 2002, and 2003, in addition to the $2,500,000.00 that BellSouth paid the City as a result of the partial settlement in 1998.[172] MAS requested payment of its 20% contingency fee on the proceeds received under the final settlement with BellSouth on several occasions, including its letters dated August 14, 2001, and December 18, 2001.[173] However, the city has refused to pay any portion of MAS' contingency fee from the final settlement or the $30,490.00 balance owed on MAS' fixed fee for the 1997-1998 compliance review.

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[171] As Leslie Ponder, counsel for BellSouth, testified:

> A. [W]e were going through and the mayor had a couple of questions, and then Mr. Smith basically said, if you, you do understand, Mr. Mayor, that if simplified tax passes during the six year period, the City will receive not only the $5.5 million, continue to receive the $5.5 million payments, but they will also get the additional revenue that would be generated by the simplified tax.
>
> Q. And how did the mayor react?
>
> A. In my opinion watching the mayor it appeared that the light bulb went off and he finally understood the benefit [of] this particular piece of what the City could get in the settlement agreement and was very happy with it.

Id.

[172] R. Doc. No. 86, Pretrial Order, Uncontested facts, ¶ 7.bb.; Testimony of Ponder, p. 114.

[173] Exhibits 127 and 145. The December 18, 2001 letter also included an invoice for $372,683.73 which MAS stated was the amount due on its contingency fee on the first $5,500,000.00 payment that the City received from BellSouth. See Exhibit 145.

From 1995 through the October, 2001 final settlement, no City representative ever said or even implied that MAS would not be compensated from the final settlement proceeds.[174] In fact, prior to the present litigation, no City representative ever informed MAS of reasons why the City was refusing to pay MAS' contingency fee.[175]

The decision to withhold payment of MAS' contingency fee was made without consulting Regan or Cain who were the two individuals most knowledgeable about the contract and MAS' work thereunder.[176]

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[174] Testimony of White, pp. 123-26, 132-33, 199.

[175] *Id.* at pp. 132-33.

[176] Testimony of Regan, pp. 75-76; Testimony of Early, pp. 48-50.

The decision to deny payment to MAS was made by individuals who played no role in negotiating the language in the contract between the City and MAS. Although it was Mavis Early, the City Attorney, who made the recommendation to the Mayor to deny payment to MAS, Early admitted that she had no involvement in the negotiations and selection of language for inclusion in the contract between MAS and the City. Testimony of Early, pp. 48-50. The same is true regarding Randall Smith, Esq., counsel for the City in the litigation between the City and BellSouth. Testimony of Regan, p. 75. Early further admitted that she never even reviewed MAS' audit reports prior to making her determination. Testimony of Early, p. 51. Early appears to have little knowledge about MAS' work. When asked about the revenue accounts which MAS had originally provided in its audit and which the City used in its settlement negotiations, Early responded:

> Q. How did the City know those code numbers existed?
>
> A. I can't say. I mean, somebody knew. I mean, I wasn't the one who said the account code numbers. But I think the – I'm thinking about the settlement agreement and there are some account code numbers and categories in the settlement agreement that I said I wanted the Department of Utilities to check out before I signed off on the settlement agreement.

Id. at pp. 52-53.

Regan testified unequivocally that she believed that MAS should be paid its contingency fee on the proceeds from the final settlement.[177] Regan further stated that neither the partial nor final settlement would have occurred but for the work that MAS performed on the audits and during settlement negotiations. As Regan testified:

> Mr. Clarke, in all honesty, the settlement could not have happened, but for the work of George White over the years.
>
> * * *
>
> I don't believe that Bell would have volunteered $30 million if they hadn't had an audit to deal with. And that's an honest assessment of what occurred.
>
> * * *
>
> [MAS] did the work. It was part of the work, their work you used in the negotiations and in the agreements, and that's how I perceived it. And as difficult as it is to be here today, it is what I perceive to be the truth.
>
> * * *
>
> I was never informed, Mr. Smith, that MAS was no longer part of this team. In other words, if you separated the two issues, the audit and the lawsuit, I was never informed, nor do I see how it could have happened.[178]

The testimony of Regan was corroborated to a large extent by that of Leslie Ponder, counsel for BellSouth, who

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[177] Testimony of Regan, pp. 88-89, 97, 99.

[178] *Id.* at pp. 79, 97, 99, 101.

testified that BellSouth would not have offered the City any payments, i.e. the $5,500,000.00 annual payments, in excess of the 1906 Agreement absent the City's lawsuit filed pursuant to the MAS audit.[179] Mr. Ponder further testified that the $5,500,000 annual payments exceed the payments that BellSouth would have paid the City absent the litigation.[180]

MAS' position is that the City breached the contract by its refusal to pay MAS' 20% contingency fee on the funds received from BellSouth pursuant to the City's final settlement with BellSouth. MAS claims that its 20% contingency fee amounts to $323,518.00 on each of the six $5,500,000.00 payments from BellSouth, for a total contingency fee in the amount of $1,941,108.00.[181] MAS' calculation of its contingency fee gives the City a credit in the amount of $3,882,410.00 per year for the years 2001 to 2006 (for a total credit in the amount of $23,294,460.00)

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[179] Testimony of Ponder, pp. 229-31.

[180] Specifically, Ponder testified:

> THE WITNESS: [I]f the litigation had never happened we would be paying 1906 until simplified tax was passed.
>
> THE COURT: So you would have been paying, presumably, correct me if I'm wrong, less than $5.5 million for the six years?
>
> THE WITNESS: No, I would have been [paying] 3.8 to four for years and years until I got something in place.
>
> THE COURT: Now, for those six years that you agreed to pay 5.5 million, if the litigation would have never occurred the franchise tax that you were paying three percent would have been less than $5.5 million per year, wouldn't it have?
>
> THE WITNESS: That's right.

Id. at p. 229.

[181] *Id.*

for payments that BellSouth might have paid to the City through 2006 pursuant to the 1906 Agreement, even though BellSouth had no legal obligation to do so given the City's breach of BellSouth's exclusivity rights.[182] This credit is based upon the testimony of MAS' accounting expert, Holly Sharp,[183] that BellSouth's revenue has decreased to the extent that its payments pursuant to the 1906 Agreement, if BellSouth had continued to honor the agreement through the year 2006, would not have increased over its payment, made prior to the settlement, of $3,882,410.00 in the year 2000.[184] As Sharp testified, the application of a zero growth rate is supported by telecommunications industry data and data regarding the New Orleans economy, both of which show a decline in growth.[185] It is further supported by evidence that BellSouth's revenues have

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[182] R. Doc. No. 97, MAS' Post-trial suggested findings of fact and conclusions of law, ¶ 84. Using the $3,882,410.00 amount that BellSouth paid pursuant to the 1906 Agreement in the year 2000 (the last payment prior to the settlement), MAS calculated its contingency fee by subtracting $3,882,410.00 from $5,500,000.00 and multiplying the resulting figure by 20% ($5,500,000.00 - $3,882,410.00 = $1,617,590.00 x 20% = $323,518.00). Exhibit 114 at bates stamp MAS 0115 (showing 2000 payment of $3,882,410.00).

[183] Sharp was qualified as an expert certified public accountant, specifically including but not limited to the areas of calculation of economic damages and valuation. Testimony of Sharp, p. 25. Sharp was asked to calculate the contingency fee due to Municipal Administrative Services by the City. *Id.;* Exhibit 197.

[184] Testimony of Sharp, pp. 30-39; Exhibit 197. In determining the growth rate of BellSouth's payments to the City, Sharp calculated the average increase in the rate of payments from 1990 to 1999 and from 1986 to 1999. Sharp found that from 1990 to 1999 there was an average decrease of .6% in the rate of payments and an average increase of only .084% from 1986 to 1999. Testimony of Sharp, p. 32; Exhibit 197

[185] *Id.*

substantially decreased.[186] Significantly, the application of a zero growth is supported by the testimony of Ponder, who testified that payments under the 1906 Agreement would have remained "static."[187] The City's argument, based upon the testimony of its expert, Philip Garrett, that BellSouth's payments would have increased at the rate of 4.7% is not supported by the credible evidence.[188]

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[186] Testimony of Sharp, pp. 34-39. The testimony of Sharp was corroborated by Philip Garrett, the City's own expert certified public accountant, who admitted that BellSouth's revenues have declined and that in 2002, BellSouth experienced a drop in fourth quarter profits and sales. Testimony of Garrett, p. 100.

[187] Testimony of Ponder, p. 106. Specifically, Ponder testified:

> THE COURT: Do you have any opinion based on your work at BellSouth or do you not have any opinion as to whether or not the franchise payments to New Orleans under the agreement that pursuant to the way which you were paying New Orleans under the 1906 Agreement would have continued to grow after 2000 or whether it had have stayed static or declined?
>
> THE WITNESS: I think that they would have stayed static, not declined.
>
> THE COURT: What do you base that on?
>
> THE WITNESS: Understand I base that on just my own knowledge of what's going on in the industry and the fact that we're facing serious competition in the City of New Orleans.

Id.

[188] In determining the growth rate of BellSouth's payments, Garrett looked at the average increase in BellSouth franchise payments to the City for only five years, i.e. 1995 through 1999. He calculated that during those years, BellSouth's franchise fee payments increased by 4.7%. Exhibit 198; Testimony of Garrett, pp. 98-99. Garrett then assumed that BellSouth's payments to the City from 2000 to 2016 would continue to grow at the rate of 4.7%. *Id.* Garrett, however,

(Continued on following page)

After listening to the testimony of Garrett and having heard the testimony of Sharp, the Court will not rely on Garrett's testimony in arriving at its opinion in this case.

BellSouth has made three payments to the City thus far pursuant to the final settlement agreement.[189] MAS argues that it is entitled to an award of $970,554.00 ($323,518.00 x 3). MAS further claims that it is entitled to declaratory judgment directing the City to pay MAS' contingency fee upon receipt of BellSouth's payments in 2004, 2005, and 2006. Finally, MAS argues that the City breached its agreement to pay MAS $40,000.00 for the 1997-1998 compliance review and, therefore, it owes MAS the unpaid balance of $30,490.00.

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admitted that he did not spend any time researching the telecommunications industry to determine whether his assumption was consistent with what is happening in that industry. Testimony of Garrett, pp. 98, 100. He further admitted that BellSouth's revenues have actually dropped since 1999, thereby not resulting in the 4.7% growth he actually contemplated. Id. at pp. 98-99. As Garrett testified:

> Q. [A]re you aware that in BellSouth's annual report it indicated that from 2000 to 2001 [its] overall operating revenue had dropped 4.7 percent?
>
> A. Yes, I am aware of that.
>
> Q. And did you hear Mr. Ponder say that [BellSouth] was hurt worse in urban areas such as New Orleans?
>
> A. . . . Yes, sir.
>
> Q. So, in fact, your report which assumes a 4.7 growth rate from 2000 to 2001, that may not actually be what happened in 2000 to 2001.
>
> A. Correct.

Testimony of Garret, pp. 98-99.

[189] R. Doc. No. 86, Pretrial order, Uncontested facts, ¶ 7.bb.

The City denies that the final settlement with BellSouth had anything to do with MAS' work.[190] It argues that the final settlement "was a 'prospective' settlement of a franchise fee dispute, whereas MAS' audit was retrospective only and would have only resulted in a lump sum payment from BellSouth."[191] Therefore, because the final settlement agreement had nothing to do with past amounts due, the City contends that it did not obtain money "recovered, refunded, or credited" from BellSouth such that MAS would be entitled to a contingency fee.

II.

This Court has jurisdiction based on diversity of citizenship pursuant to 28 U.S.C. § 1332 because MAS is a Texas corporation whose principal place of business is in Texas, the City is a municipal political subdivision organized under the laws of the State of Louisiana, and the amount in controversy exceeds $75,000.00, exclusive of interest and costs. Venue is proper in the Eastern District of Louisiana pursuant to 28 U.S.C. § 1391(a) inasmuch as the events or omissions giving rise to the claims in this matter occurred within this district.

Because the Court's subject matter jurisdiction is based on diversity of citizenship, the Court must apply Louisiana law. *Bellsouth Telecommunications, Inc. v. T.L.*

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[190] Specifically, the City argues that, "[t]here is nothing in the Mutual Agreement of Compromise and Settlement which establishes by a preponderance that the City recovered, or was refunded or credited any money from BellSouth as a result of the audits performed by MAS." R. Doc. No. 94, City's Proposed post-trial findings of fact and conclusions of law, ¶ 27.

[191] *Id.* at ¶ 28; Testimony of Mortal, pp. 183-84.

James and Co., Inc., 1994 WL 193766, *1 (E.D.La. 1994); *Ardoin v. Formosa Plastics Corp.*, 884 F.Supp. 209, 212 (M.D.La. 1994). Louisiana law provides that, "[c]ontracts have the effect of law between the parties and may be dissolved only through the consent of the parties or on grounds provided by law." La. C.C. art. 1983. "Interpretation of a contract is the determination of the common intent of the parties." La. C.C. art. 2045. "When the words of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties' intent." La. C.C. art. 2046; *Belle Pass Terminal, Inc. v. Jolin, Inc.*, 634 So.2d 466, 479 (La. App. 1 Cir. 1994). "In such cases, the meaning and intent of the parties to the written contract must be sought within the four corners of the instrument and cannot be explained or contradicted by parol evidence."[192] *Amoco Production Company v. Fina Oil & Chemical Company*, 670 So.2d 502, 511 (La. App. 1 Cir. 1996); La. C.C. art. 1848. Further, "[t]he words of a contract must be given their generally prevailing meaning." La. C.C. art. 2047. "Each provision in a contract must be interpreted in light of the other provisions so that each is given the meaning suggested by the contract as a whole." La. C.C. art. 2050.

On the other hand, "[w]hen the terms of a written contract are susceptible to more than one interpretation,

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[192] As the Court in *Amoco* stated, "Contracts, subject to interpretation from the instrument's four corners without the necessity of extrinsic evidence, are to be interpreted as a matter of law, and the use of extrinsic evidence is proper only where a contract is ambiguous after an examination of the four corners of the agreement." *Amoco Production Company*, 670 So.2d at 511 (citing *Martin Exploration Company v. Amoco Production Company*, 637 So.2d 1202, 1205 (La. App. 1 Cir. 1994)).

or there is uncertainty or ambiguity as to its provisions, or the intent of the parties cannot be ascertained from the language employed, parol evidence is admissible to clarify the ambiguity or to show the intention of the parties." *Amoco Production Company*, 670 So.2d at 511. "Intent is an issue of fact which is to be inferred from all of the surrounding circumstances." *Id.* (citing *Kuswa & Associates, Inc. v. Thibaut Construction Co., Inc.*, 463 So.2d 1264, 1266 (La. 1985)). "A doubtful provision must be interpreted in light of the nature of the contract, equity, usages, the conduct of the parties before and after the information of the contract, and of other contracts of a like nature between the same parties." La. C.C. art. 2053. "Whether a contract is ambiguous or not is a question of law." *Amoco Production Company*, 670 So.2d at 511.

Contracts must be enforced as written, and a party's after the fact dissatisfaction with its contractual obligations provides no basis for obtaining relief. *Barrerra v. Ciolino*, 636 So.2d 218, 223 (La. 1994); La. C.C. art. 1983. Courts "cannot undermine a contract simply because it was a bad deal, or is believed to be, for one of the parties." *City of Kenner v. Jumonville*, 701 So.2d 223, 229 (La. App. 5 Cir. 1997); *Adams v. Falcon Equipment Corporation*, 717 So.2d 282, 289 (La. App. 2 Cir. 1998) ("It is not the province of the court to change the terms of a contract which has been entered into, even though it may be a harsh and unreasonable one; nor will the dictates of equity be followed if by so doing the terms of the contract are ignored, for the folly or wisdom of a contract is not for the court to pass upon, its terms, however, onerous they may be, must be enforced if such is the clear meaning of the language used, and the intention of the parties in using that language"). "Likewise, the fact that compliance with a contract or

agreement may be more expensive than originally anticipated is no defense." *City of Kenner v. Jumonville*, 702 So.2d at 229.

In the present case, the threshold issue is whether the terms in the contract between the City and MAS are ambiguous or certain. After carefully reviewing the entire contract, the Court finds that the words are clear, concise, and unambiguous. As set forth previously, the contract at issue requires the city to pay MAS "an amount not to exceed one hundred [sic] dollars ($100,000) plus a contingency fee equal to twenty percent (20%) of any amounts recovered, refunded or credited."[193] Although this sentence does not expressly state to what amounts it refers, when this provision is read in light of the other provisions of the contract and the contract as a whole, there is no question that MAS' contingency fee is limited to any amounts "recovered, refunded or credited" from BellSouth as a result of MAS' audit.[194] This conclusion is consistent with the intent of the parties.[195]

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[193] Exhibit 10.

[194] Specifically, pursuant to the contract, MAS expressly agreed to perform an audit of BellSouth's franchise fee payments to the City in exchange for certain compensation. MAS' compensation, therefore, was directly tied to the work it agreed to perform. Exhibit 10, pp. 2-3. Additionally, the second paragraph of the compensation provision makes express reference to amounts received "as a result of the audit and/or audit findings" and "the amounts acknowledged by the City as being due as a result of the audit." *Id.* at p. 4. Considering the foregoing, the Court finds that MAS' contingency fee is limited to "any amounts recovered, refunded or credited" from BellSouth as a result of MAS' audit.

[195] As White testified:

Q. But you understood even after the contract was signed, didn't you, Mr. White, that the 20 percent of recovery,

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The parties agree that the City has not been "refunded" or "credited" any money from BellSouth as a result of the audit.[196] The issue before this Court, therefore, is whether the City has "recovered" any amounts from BellSouth as a result of MAS' audit. Based on the evidence and testimony of this case, the Court finds that the City's final settlement with BellSouth constitutes such a recovery and that MAS is entitled to its 20% contingency fee on the payments made by BellSouth to the City pursuant to the same.

As stated above, the terms of the contract are beyond dispute. The City is obligated to pay MAS' 20% of any amounts recovered from BellSouth as a result of the audit. It is also undisputed that the City's final settlement with BellSouth provides for six annual payments of $5,500,000.00 from the years 2001 through 2006, which payments exceed the payments that BellSouth would have paid the City absent the litigation.[197] In exchange, the City agreed, *inter alia*, to fully release its claims against BellSouth arising from MAS' audit.[198] The evidence is clear. Absent the City's audit claims, BellSouth would not have offered the City any monies in excess of the amounts

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refund or credit was to be recovery, refund or credit as a result of your audit, did you not?

A. Of course, there is a direct correlation to the compensation and the work that we performed.

B.

Testimony of White, pp. 143-44.

[196] R. Doc. No. 94, City's Proposed post-trial findings of fact and conclusions of law, p. 12, ¶10; R. Doc. No. 97, MAS' Post-trial suggested findings of fact and conclusions of law, p. 30, ¶5.

[197] Testimony of Ponder, pp. 229, 231; Exhibit 137.

[198] Exhibit 137, ¶¶ 2.3 - 2.4.

paid pursuant to the 1906 Agreement.[199] The Court finds that the City's final settlement with BellSouth cannot constitute anything other than amounts recovered from BellSouth.[200]

Moreover, the Court finds that the amounts recovered by the City from BellSouth pursuant to the final settlement are clearly a result, if not the result, of MAS' audit. As Regan testified, neither the partial nor the final settlement would have happened but for the work that MAS performed on the audits and during settlement negotiations.[201] Regan's testimony is particularly compelling given that it was her department that hired MAS and "sourced" the contract and that she was a member of the City's team during settlement negotiations.[202] Regan's testimony was corroborated by that of Ponder who admitted that absent the City's lawsuit claims pursuant to MAS' audit, BellSouth would not have offered the City any payments in excess of the 1906 Agreement.[203]

Although the City denies that the amounts paid and promised to be paid pursuant to the final BellSouth settlement have any relationship to MAS' work, the undisputed facts are that the City filed the lawsuit based upon MAS' findings and that the City solicited and relied

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[199] Testimony of Ponder, pp. 229, 231.

[200] This conclusion is consistent with the meaning of the word "recover" which includes "[t]o get back or regain in full or in equivalence" or "[t]o obtain by . . . legal process." Black's Law Dictionary (7th ed. 1999). The City undoubtedly obtained monies by legal process by virtue of its litigation and subsequent settlement with BellSouth.

[201] Testimony of Regan, pp. 79, 97, 99, 101.

[202] *Id.* at pp.72-75, 85-86, 94-98.

[203] Testimony of Ponder, pp. 229-31.

upon MAS' expertise and advice during the settlement negotiations. MAS, pursuant to the City's request, evaluated the settlement proposals in light of MAS' audit findings and proposed the very settlement structure utilized in the final settlement. On several occasions, the City assured MAS that it would pay MAS' fee on the proceeds received from the final settlement. Moreover, the final settlement agreement resolved and released all claims in the litigation, including claims made by the City pursuant to MAS' audit findings. The City would not have recovered any monies from BellSouth without the expertise and work of MAS. The BellSouth settlement recovery, therefore, was clearly a result of MAS' audit and MAS is entitled to its contingency fee.

None of the arguments made by the City in support of its refusal to pay MAS' contingency fee are supported by the evidence. Contrary to the City's contention,[204] the contract did not condition MAS' contingency fee on an express acknowledgment by BellSouth that the $5,500,000.00 payments represented any portion of the city's audit claim.[205] As stated above, the evidence is clear that BellSouth would not have offered the City any payments in excess of the 1906 Agreement absent the City's claims made pursuant to MAS' audit.[206] Moreover, as White testified, the final settlement was intentionally

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[204] Specifically, the City contends that MAS is not entitled to its contingency fee because MAS "has failed to specify any provision in the [final settlement] that provides that these annual payment [sic] are to compensate the City for any past amounts allegedly due from BellSouth." R. Doc. No. 95, City's Post-trial memorandum, pp. 3-4.

[205] Exhibit 10.

[206] Testimony of Ponder, pp. 229, 231.

structured in an effort to recoup as much money as possible without requiring BellSouth to admit liability.[207]

The City's argument is further refuted by the fact that the language of the partial settlement agreement, like the final settlement agreement, contains no admission of liability by BellSouth.[208] To the contrary, the partial settlement agreement expressly reserved BellSouth's right "to contest that any sums are due" and provided "that the execution of this Agreement does not in any way constitute an admission of any nature whatsoever by or on behalf of any party."[209] Interestingly, the City concedes that MAS was entitled to a contingency fee on the partial settlement. Clearly, the city's argument is illogical and it is rejected by the Court.

The City also contends that it did not recover any money owed by BellSouth because the $5,500,000.00 "annual payments were intended to match expected revenues from the simplified tax legislation and to be a 'bridge payment' from the cancellation of the 1906 Agreement to the passage of the new tax plan."[210] Relying on representations by BellSouth, the City further contends that the payments were basically a buy out of BellSouth's "future obligation to pay under the 1906 Agreement."[211]

Whether BellSouth, for political or accounting reasons, characterized the payments as a "bridge loan," "buy

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[207] Testimony of White, pp. 162-64; Testimony of Grant, pp. 259, 272-73.

[208] Compare Exhibit 183 to 137.

[209] Exhibit 183 at bates stamp MAS 0004.

[210] R. Doc. No. 95, City's Post-trial memorandum, p. 4.

[211] *Id.*

out," or otherwise, is wholly irrelevant to the issue of MAS' right to recover its fee pursuant to the contract. As stated above, the contract did not condition MAS' right to recover a contingency fee on a BellSouth admission that the $5,500,000.00 payments were to compensate the City for the claims it filed as a result of the audit.[212] The contract simply required that in order for MAS to collect its contingency fee, the City had to recover amounts from BellSouth as a result of MAS' work.[213] As previously stated, absent the City's lawsuit which was subsequent to and based upon MAS' audit, BellSouth would not have agreed to pay the $5,500,000.00 annual payments.[214] Therefore, MAS is entitled to its contingency fee and BellSouth's characterization of the payments as monies paid for any reason other than the audit is wholly irrelevant.[215]

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[212] See Exhibit 10.

[213] Exhibit 10, p. 4.

[214] Specifically, Ponder testified:

> THE COURT: . . . So if all of this wouldn't have occurred, the City's lawsuit and all of these discussions, these are not payments, these bridge payments are not payments you would have made; is that correct?
>
> THE WITNESS: That's correct.

Testimony of Ponder, p. 229.

[215] Moreover, the evidence suggests that the City's bridge loan theory was something that was created after the fact. As White testified, the flat annual fee to be paid by BellSouth was never characterized as a bridge loan during all of the settlement negotiations he attended. Testimony of White, pp. 172-73. White's testimony in this respect is corroborated by the lack of any document characterizing the fixed fee payments as loans needed to bridge the City's revenue pending passage of the simplified tax plan. Most significantly, the bridge loan theory is further weakened by the fact that BellSouth agreed to pay the City $5,500,000.00 from 2001 through 2006 even if the simplified tax

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The City's contention that no contingency fee is owed because its agreement to terminate the 1906 Agreement rendered the City worse off than it was prior to the settlement is likewise unavailing.[216] First, the contract does not condition MAS' compensation on the results of any economic analysis.[217] Likewise, the contract does not state that MAS' compensation was conditioned upon the City's ability to negotiate an improved franchise agreement with BellSouth or, alternatively, on the indefinite continuation of the 1906 Agreement.[218] Absent such terms in the contract, the City's protest that it is now worse off fails to provide a defense as a matter of law. See *Hoyt v. Hi-Lo Oil*

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plan was enacted during that period. Testimony of Morial, p. 132; Testimony of Ponder, pp. 111-13; Exhibit 174.

Similarly, the buy out theory is unsupported by the evidence. First, the City's buy out theory is inconsistent with its bridge loan theory. Second, neither the terms of the settlement agreement nor any of counsel's correspondence during the negotiations refer to the fixed annual payments as a buy out. Finally, the theory rests on the notion that BellSouth would agree to pay $33,000,000.00 to buy out a contract that it considered to be invalid and unenforceable due to the City's breach of the same in 1996. More significantly, even if the parties had characterized the fixed fee payments as a buy out, such characterization does not defeat MAS' right to collect its fee. Again, the evidence is clear that BellSouth would not have offered to buy out the 1906 Agreement absent the pressure of the City's audit claims in its lawsuit. Testimony of Ponder, pp. 229, 231. Therefore, the monies that BellSouth agreed to pay the City, whether they be a buy out or a bridge loan, constitute monies recovered from BellSouth.

[216] R. Doc. No. 95, City's Post-trial memorandum, pp. 6-7. In particular, the City contends that an economic analysis of the value of the settlement agreement shows that the City was rendered worse off than it was prior to the settlement and, therefore, the City failed to recover any monies from BellSouth. *Id.*

[217] Exhibit 10.

[218] Testimony of White, p. 53; Exhibit 10.

Company, 419 So.2d 994, 996 (La. App. 3 Cir. 1982) (defendant could not avoid obligation to pay plaintiff's commission on sales of gas by asserting that profit margin on sales fell below normal where there was no provision in contract conditioning defendant's obligation to pay on receipt of normal profit margin on sales) (superceded in part on other grounds by La. C.C. art. 3494(1) as stated in *Wonycott v. Southern Business Machines, Inc.*, 595 So.2d 723, 725 (La. App. 5 Cir. 1992)).

Notwithstanding the foregoing, there is no evidence that the City was forced to terminate the 1906 Agreement. To the contrary, the evidence shows that the City wanted to terminate the 1906 Agreement for several years prior to the litigation[219] and the City knew or, at a minimum, had ample notice that BellSouth would challenge the validity of the 1906 Agreement if the City filed suit against BellSouth.[220] Moreover, the City never had any guarantee that BellSouth would indefinitely continue to make payments pursuant to the 1906 Agreement after the City violated BellSouth's exclusivity rights in 1996. Finally, contrary to the City's arguments, the evidence establishes that the City may find itself better off pursuant to the settlement through 2006,[221] and it is positioned to receive significantly

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[219] In fact, the possibility of renegotiating the existing franchise agreement is reflected in the preamble to the contract and in Regan's March 15, 1996 letter to BellSouth. Exhibits 10, 23.

[220] Testimony of Regan, pp. 77-78, 98-99; Testimony of White, pp. 91-92; Testimony of Morial, pp. 126-27, 129, 140-41, 154-55, 165; Exhibit 33.

[221] The amount of revenue that will be collected from BellSouth after 2006 cannot be calculated with certainty because no one, including the City's expert, can predict whether the simplified tax legislation will be enacted or whether the City Council will adopt the proposed LMA agreement. Testimony of Garrett, p. 99-102, Testimony of Sharp,

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enhanced revenues, thereafter, if the simplified tax legislation is enacted.[222] Considering the foregoing, the City's argument that the final settlement rendered it worse off than it was prior to the same is meritless.

The City next argues that MAS is not owed a contingency fee because under MAS' theory of the case, i.e. that it is entitled to any amounts recovered from BellSouth, MAS would be entitled to a contingency fee "in perpetuity."[223] In other words, according to the City, MAS would argue that "it is entitled to a 20% fee from any agreement the City were to ever enter into with BellSouth that resulted in additional funds to the City, even if that agreement lasted another 95 years, like the 1906 Agreement, because that

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p. 42-43. Additionally, because the settlement payments cover only the years 2001 to 2006, the Court finds that any economic forecast past the year 2006 is irrelevant.

[222] As Mayor Morial testified, the City obtained an additional $1,300,000.00 per year for six years "[a]s a result of the settlement agreement." Testimony of Morial, p. 143. Even the City's expert witness agreed that the City is better off through 2006 under the settlement. Testimony of Garrett, p. 90. The City also obtained a full release of its liability to refund payments received after 1996 when it breached BellSouth's exclusivity rights pursuant to the 1906 Agreement. Testimony of Ponder, p. 253. According to counsel for BellSouth, the monetary value of this release amounts to approximately $18,000,000.00. *Id.* Finally, BellSouth agreed that it would continue the $5,500,000.00 payments from 2001 through 2006 even if the simplified tax legislation was enacted during that period. Testimony of Ponder, pp. 111-13. The potential benefit of that aspect of the final settlement was characterized by counsel for BellSouth as "a "$30-35 million windfall" to the City. *Id.* Considering the foregoing, the City's argument that the final settlement rendered it worse off than it was prior to the same is less than compelling. The City made a reasoned choice. It will have to live up to the same and be accountable for it.

[223] R. Doc. No. 95, City's Post-trial memorandum, p. 5; Testimony of Morial, p. 186.

future agreement would be a result of the MAS audit."[224] The Court finds the City's argument to be unpersuasive.

Louisiana Civil Code article 2049 provides that, "[a] provision susceptible of different meanings must be interpreted with a meaning that renders it effective and not one that renders it ineffective." Louisiana Civil Code article 2051 further provides:

> Although a contract is worded in general terms, it must be interpreted to cover only those things that it appears the parties intended to include.

The evidence clearly establishes that the parties intended that MAS' contingency fee would be limited to those amounts recovered from BellSouth as a result of MAS' audit. The only amounts that MAS claims to have recovered from BellSouth as a result of MAS' audit are the $5,500,000.00 annual payments resulting from the final settlement with BellSouth. Therefore, the City's contention that MAS could claim an entitlement to a contingency fee "in perpetuity" is not only an issue that is not argued before the Court, but it is an argument that is contrary to the fundamental principles of contract interpretation. MAS has never asserted entitlement to a contingency fee "in perpetuity." MAS' claim is, and always has been, that it is entitled to its contingency fee on the sums recovered from BellSouth, i.e., the fixed fee portion of the settlement ($5,500,000.00 for the years 2001 to 2006) less the amount that BellSouth otherwise might have paid the City for those six years, absent the litigation, pursuant to the 1906

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[224] R. Doc. No. 95, City's Post-trial memorandum, p. 5

Agreement.[225] MAS has never claimed any entitlement to a fee on revenue generated from any other source.[226] Accordingly, the City's argument is rejected by the Court.

The City's next assertion that its refusal to pay MAS is justified because MAS assigned the contract to DMG/MAXIMUS in violation of the terms of the agreement is similarly without merit.[227] First, the evidence shows that no assignment of any sort was ever executed. Rather, MAS has a business relationship with MAXIMUS, the successor of DMG/MAXIMUS and David M. Griffith & Associates.[228] The City was fully aware of and agreed to this relationship.[229] In fact, the contract expressly authorized MAS to utilize DMG's services as necessary[230] and the City made certain payments pursuant to the contract directly to MAXIMUS.[231] There is no evidence to indicate that the City suffered any detriment by virtue of MAS' relationship

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[225] R. Doc. No. 97, MAS' Post-trial suggested findings of fact and conclusions of law, ¶¶ 83-84, 86.

[226] Contrary to the City's arguments that "MAS could claim that it is entitled to any and all amounts paid by BellSouth to the City, including property taxes, parking tickets, sales taxes, etc.," MAS has never claimed any entitlement to a fee on revenue generated from any other source. R. Doc. No. 91, City's Reply memorandum to MAS' post-trial suggested findings of fact, p. 9, ¶ 71.

[227] R. Doc. No. 86, Pretrial order, Material facts claimed by the City, p. 11; Exhibit 10, p. 5.

[228] Testimony of White, pp. 39-42, 46-47.

[229] Testimony of White, pp. 42, 46, 89-90; Testimony of Grant, pp. 231, 238; Testimony of Regan, pp. 73-74.

[230] Exhibit 10, p. 3.

[231] Exhibit 138.

with MAXIMUS and the City simply has no basis for protesting it.[232]

Finally, the City asserts that payment of MAS' contingency fee would be a donation of public funds in violation of the Louisiana Constitution, Article VII, Section 14(A), which provides, in pertinent part:[233]

> (A) Prohibited Uses. Except as otherwise provided by this constitution, the funds, credit, property, or things of value of the state or of any political subdivision shall not be loaned, pledged,

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[232] Moreover, even if MAS had assigned the contract, such assignment would not amount to anything more than a breach of an ancillary obligation which would not excuse the City from its obligation to compensate MAS in accordance with the terms of the contract. *Publicker Chemical Corp v Belcher Oil Co,* 792 F.2d 482, 486 and n. 9 (5th Cir. 1986) (holding that under Louisiana law, breach of an ancillary obligation, i.e., a slight breach by one party, does not necessarily relieve the injured party of its obligation under the contract); *Texaco Exploration & Production Inc v Smackco, Ltd.,* 1999 WL 447082, *4 (E.D La. 6/24/99) (holding that plaintiff's breach of a provision in contract was not so substantial as to be the very foundation upon which defendant obligated itself and, therefore, it was a breach of an ancillary obligation which did not dissolve the contract).

[233] R. Doc. No. 95, City's Post-trial memorandum, pp. 9-11. Specifically, the City contends that payment of MAS' contingency fee would unreasonably overcompensate MAS for its work. Id. at p. 11. According to the City, MAS employees worked approximately 1,600 hours for the City on this project. Exhibit 189. The City further contends that if it were ordered to pay MAS the approximately $2,000,000.00 that it seeks in this litigation, MAS will have received approximately $2,500,000.00 ($2,000,000 + $495,246.00 it has already received as a result of the partial settlement and $100,000.00 fixed fee) for 1,600 hours of work, which equals an average hourly rate of over $1,500.00 per hour based upon the hourly rates to which MAS stipulated at trial. *Id.* at p. 12. Therefore, it is the City's position that even if the final settlement is considered to be a recovery as a result of MAS' audit, the payment of such a substantial contingency fee would constitute a donation of public funds in violation of the Louisiana Constitution. *Id.*

> or donated to or for any person, association, or corporation, public or private.

Although this argument contradicts the City's own representation to BellSouth that, "[t]here is no prohibition of this type of arrangement in Louisiana, nor is it recognized as unfair or a violation of public policy,"[234] it is well established that payment of fees pursuant to a consulting contract is not a donation of public funds in violation of the Louisiana Constitution. "A public entity has wide discretion to contract, provided it receives sufficient consideration, which may include economic return . . ." *Board of Assessors v. City of New Orleans,* 829 So.2d 501, 509 (La. App. 4 Cir. 2002). The purpose of the constitutional prohibition against donation of public funds "is to protect against alienation of public assets for other than governmental purposes, and does not intend to address the conduct of the governmental entity's legitimate affairs." *Id.* at 510; see also *Civil Service Commission of the City of New Orleans v. The City of New Orleans,* 839 So.2d 196, 201 (La. App. 4 Cir. 2003) (Section 14 "is violated whenever the state or a political subdivision seeks to give up something of value when it is under no legal obligation to do so") (quoting *City of Port Allen, Louisiana v. Louisiana Municipal Risk Management Agency, Inc.,* 439 So.2d 399, 401 (La. 1983)).

In *Town of Mamou v. Fontenont,* 756 So.2d 719, 723 (La. App. 3 Cir. 2000), the court rejected a challenge made to the validity of a contingency fee contract negotiated between a town and an attorney who was retained to

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[234] Exhibit 23. The Court further notes that the City's argument is also contrary to counsel for the City's acknowledgment at the pretrial conference held on March 27, 2003, that the City did not contest the validity of the contract between the City and MAS. R. Doc. No. 71.

pursue an accounting and collection of funds from a hospital. The court held:

> Because payment on a contingency fee basis is a valid method of payment in exchange for services, that method is not in and of itself a donation or unearned gift. Thus, to the extent that the trial court found that a contingency fee automatically violates La. Const. art. VII, § 14(A) because it does not reflect the reasonable value of an attorney's services, it erred as a matter of law.[235]

Id.

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[235] In addition, the Louisiana Attorney General has issued numerous opinions stating that there are no constitutional prohibitions preventing governmental entities from obtaining professional services pursuant to contingency fee contracts. See 1989 WL 454545, *2 (La.A.G. 12/22/89) (stating that Department of Revenue and Taxation's contingency fee contract with law firm for the collection of delinquent gift and inheritance taxes, on an incentive fee basis, does not constitute a donation of public funds in violation of Article VII, Section 14 of the Constitution); 1986 WL 237170, *1 (La.A.G. 12/22/86) (finding no constitutional or statutory prohibitions against contingency fee arrangement to compensate contractors providing legitimate professional services for the State); 1986 WL 236731, *1 (La.A.G. 4/21/86) ("[T]here is no prohibition on utilizing a contingent fee arrangement if such is in the best interest of the district"); 1985 WL 203371 (La.A.G. 7/2/85) ("We do not find in the constitution or statutes any prohibition on utilization of a contingent fee arrangement to compensate a contractor providing legitimate services for the state"); see also 1994 WL 518960, *1 (finding that employees' discount on public hospital services is part of the compensation package of employees for services rendered and, therefore, not a donation of public funds. "A donation is a gratuitous disposition of property."); 1990 WL 544816 (La.A.G. 6/7/90) (stating that indemnity agreement in favor of private corporation does not fit the definition of a loan or donation of public funds since "both contracting parties gain a pecuniary or otherwise valuable advantage through the contract"). The Louisiana Attorney General has also opined that the prohibition of Article VII, Section 14 "must be interpreted

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The decision in *Varnado v. Hospital Service District No. 1*, 730 So.2d 1066 (La. App. 1 Cir. 1999), upon which the City relies, is wholly inapplicable to the facts of this case. The *Varnado* court held that a "revenue-enhancement compensation" provision in a public hospital's contract with one of its doctors was a bonus payment in violation of the Louisiana Constitution.[236] *Id.* at 1068. In striking contrast to *Varnado*, the contingency fee provision at issue in this case was not a bonus, but it was an integral part of MAS' compensation for the work. Nothing in *Varnado* can be read to suggest that a contingency fee equates to an illegal bonus payment.

Additionally, contrary to the City's assertion that payment of MAS' contingency fee would unreasonably overcompensate MAS in light of the hours actually expended on this project, in a subsequent appeal the court in

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stricti juris, and anything not literally prohibited thereby would be permitted. 1977 WL 39336, *5 (La.A.G. 3/28/77). Although not binding, Louisiana courts recognize the persuasive authority of Attorney General Opinions. *City of New Orleans v. Board of Directors of Louisiana State Museum*, 739 So.2d 748, 753 n.11 (La. 1999).

[236] Specifically, the Court held:

> The revenue-enhancement compensation was set at a rate of '13% of total revenues generated in excess of current hospital revenue receipts . . .' This compensation was not based upon the services provided only by plaintiff, but the increased revenues were based upon the performance of other individuals in the entire hospital. In addition, this compensation was for the normal duties plaintiff's salary contractually required him to complete; no extra duties beyond his regular duties were required. Therefore, the revenue-enhancement compensation was a bonus payment which is specifically prohibited under Constitution article VII, section 14(A).

Id. at 1068.

Town of Mamou made it clear that the reasonableness of a contingency fee cannot be assessed by multiplying the number hours worked by an hourly rate. *Town of Mamou v. Fontenont,* 816 So.2d 958, 966 (La. App. 3 Cir. 2002). Specifically, the court stated:

> [T]he reasonableness of a contingent fee cannot be determined by simply multiplying the hours worked by an hourly rate customary in the legal community. To do so would be both overly simplistic and destructive of the whole contingent fee concept.[237]

Id. at 966. Rather, the court noted that the relevant inquiry is whether the percentage charged on the contingency fee is reasonable. *Id.* at 967. In this case, the Court finds that there is nothing unreasonable about a 20% contingency fee. MAS' 20% fee is particularly reasonable when considered in light of the complexity of the work and the expertise which the City undeniably lacked and that MAS brought to it. As the City's own expert testified, utility audit work is very specialized and the work requires personnel with knowledge of the rules and regulations of the industry, governmental experience, and the willingness to analyze volumes of documents.[238] In addition, MAS' fee includes compensation that must be reimbursed to the subcontractors that the City required MAS to retain.[239] These factors, in addition to the inherent risk

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[237] Unlike this case, the reasonableness of the contingent fee was an issue in *Town of Mamou* because the Rules of Professional Conduct governing attorneys' services require attorney's fees to be reasonable. *Town of Mamou*, 756 So.2d at 723.

[238] Testimony of Garrett, p. 97.

[239] Testimony of White, pp. 53-55; Exhibit 10, p. 3.

assumed by MAS when it entered into this contingency fee contract, support the reasonableness of MAS' fee. Moreover, the evidence is uncontradicted that the City would not have recovered any monies from BellSouth without the expertise and work of MAS. MAS, in essence, generated the revenue upon which its fee must be paid. As such, payment of the contractual fee to which the City agreed cannot be characterized as a donation of public funds. The City has simply no legal basis for its refusal to pay MAS in accordance with the parties' contract.[240]

Likewise, the City has no basis for its refusal to pay MAS the balance owed for the 1997-1998 compliance review, i.e. $30,490.00. Although the City concedes that it requested MAS to perform this additional work,[241] the City refuses to remit the balanced owed on the basis that there was never a contract or agreement between the parties for any additional compensation beyond that which was

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[240] Although not raised in any of its post-trial pleadings, the City suggested in its pretrial order that MAS' contingency fee should be reduced from 20% to 15% based upon MAS' offer to accept a discounted fee. R. Doc. No. 86, Pretrial order, pp. 9, 19. MAS' offer to reduce its fee on the proceeds from the final settlement, however, was expressly predicated upon MAS' receipt of payment "in three equal installments in each of the three months following the first payment or credit" from BellSouth. It is undisputed that the City failed to comply with this condition. Indeed, the City has refused to ever pay MAS any portion of its contingency fee on the final settlement, much less within the three months required by MAS' offer. Because the condition upon which MAS' offer to reduce its contingency fee was never met, MAS' offer to reduce its contingency fee lapsed by its own terms. See *Faxon v. Albert H. Hart Corp.*, 393 So.2d 237, 239 (La. App. 1 Cir. 1980) (holding that plaintiff was entitled to collect his full fee as provided in the original contract where his offer to waive his fee was pursuant to a subsequent agreement which was then abrogated by the parties).

[241] R. Doc. No. 86, Pretrial order, Uncontested facts, ¶7 .q.

contemplated in the original contract.[242] The Court finds that the City's argument is unsupported by the evidence.

The evidence establishes that the City and MAS entered into an oral agreement in which MAS agreed to audit BellSouth's franchise payments for two more years in exchange for the payment of $40,000.00 plus a 20% contingency fee.[243] Pursuant to Louisiana law, an oral agreement for a price in excess of five hundred dollars must be proved by at least one witness and other corroborating circumstances. La. C.C. art. 1846. A party to an oral agreement may serve as its own credible witness. *Dupuy v. Riley,* 557 So.2d 703, 707 (La. App. 4 Cir. 1990). "'Other corroborating circumstances' need only be general in nature; independent proof of every detail of the agreement is not required." *Smith v. Dishman & Bennett Specialty Co.,* 805 So.2d 1220, 1223 (La. App. 2 Cir. 2002).

White testified, on numerous occasions at trial, that upon being requested by the City to conduct an additional audit for the years 1997 and 1998, MAS agreed to do so, but only for an additional fee of $40,000.00 plus the original 20% contingency fee.[244] White further testified that the City agreed to MAS' proposed compensation and, in fact, the City made a partial payment of $9,510.00 in furtherance of that agreement.[245]

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[242] R. Doc. No. 94, City's Proposed post-trial findings of fact and conclusions of law, p. 5, ¶¶ 14-15.

[243] Testimony of White, pp. 81-83; Testimony of Regan, pp. 82-83, 88, 103; Exhibits 65 and 66.

[244] Testimony of White, pp. 81-83.

[245] *Id.*

White's testimony was corroborated at trial by written correspondence to Regan, carbon copied to the Mayor and the City Attorney, dated July 12, 1999, and October 22, 1999, wherein MAS set forth the parties' agreement as to payment of these additional fees.[246] It was further corroborated by a copy of the check in the amount of $9,510.00 remitted as a partial payment on the $40,000.00 fee.[247] Most notably, White's testimony was corroborated by the testimony of Regan who confirmed the parties' agreement and further testified that she discussed the matter with Mayor Morial who approved the payment of the additional fees.[248] In light of the foregoing documentary and testimonial evidence, the Court finds that MAS has sustained its burden of proving that an oral agreement existed between MAS and the City with respect to MAS' compensation for the 1997-1998 compliance review. MAS is, therefore, entitled to the balance of $30,490.00.

MAS also seeks attorney fees incurred in this litigation pursuant to Louisiana's Open Account Statute, La. R.S. 9:2781, which provides that a party who "fails to pay an open account within thirty days after the claimant sends written demand therefor correctly setting forth the amount owed," is liable to the claimant for reasonable attorney fees. Because the open account statute is penal in nature, it "must be strictly construed and its provisions fully complied with before a penalty award of attorney fees may be made." *Savant Insurance Services, Inc. v. Central Oil and Supply Corporation,* 821 So.2d 623, 633 (La. App. 2 Cir. 2002). Accordingly, Louisiana courts have held that "under the precise wording of this statute, unless the

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[246] Exhibits 65-66.

[247] Exhibit 138.

[248] Testimony of Regan, pp. 82-83, 88, 103, 108.

amount demanded is correct, attorney's fees are not due." *Montgomery Stire & Partners, Inc. v. London Livery, LTD,* 769 So.2d 703, 706-07 (La. App. 4 Cir. 2000).

Without expressly deciding whether or not this lawsuit for unpaid fees constitutes an open account, the Court finds that MAS is not entitled to attorney fees in any event because it failed to comply with the provisions of La. R.S. 9:2781. Specifically, the demand letter and attached invoice sent to the City by MAS on December 18, 2001, did not set forth the correct amount owed by the City.[249] Accordingly, because the amount demanded was incorrect, MAS is not entitled to statutory attorney fees pursuant to La. R.S. 9:2781. See *Savant Insurance Services, Inc.,* 821 So.2d at 633.

Having considered the evidence in this case, it is the determination of this Court that MAS is entitled to damages as a result of the City's breach of contract. Specifically, MAS is entitled to an award of $970,554.00, which represents its 20% contingency fee on the amounts paid to the City by BellSouth thus far, plus $30,490.00, the

[249] In its December 18, 2001 letter to Mayor Morial, MAS demanded payment m the amount of $372,683.73. Exhibit 145. This figure represented a contingency fee of 20% of the difference between $5,500,000.00, the amount paid by BellSouth pursuant to the settlement agreement that year, and $3,636,581.00, the franchise fee paid by BellSouth in 1998. Testimony of White, pp. 157-58. Although MAS claimed at trial that the 1998 franchise fee was the most recent data it had, the information provided by BellSouth, which was attached to counsel for the City's March 29, 2001 letter to Mayor Morial and MAS, indicates that BellSouth paid the City $3,882,410.00 in the year 2000. Exhibit 114. In fact, in its post-trial pleadings, MAS concedes that the $3,882,410.00 figure should be used in calculating its contingency fee. R. Doc. No. 96, MAS' Post-trial memorandum, p. 6. Accordingly, any contingency fee awarded should be based on the difference between $5,500,000.00 and $3,882,410.00.

balance owed for MAS' work on the 1997-1998 audit, together with interest thereon.[250] MAS is further entitled to a declaratory judgment directing the City to pay MAS $323,518.00 upon each receipt of BellSouth's payments in the years 2004, 2005, and 2006. Judgment shall be entered in accordance with these findings of fact and conclusions of law.

New Orleans, Louisiana, this 15th day of July, 2003.

/s/ Lance M. Africk
LANCE M. AFRICK
UNITED STATES
DISTRICT JUDGE

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[250] Pursuant to "28 U S.C. § 1961(a), in diversity cases, post-judgment interest is calculated at the federal rate, while pre-judgment interest is calculated under state law." *Boston Old Colony Insurance v. Tiner Associates, Inc,* 288 F.3d 222, 234 (5th Cir. 2002). Pursuant to La. C.C. art. 2000, MAS is entitled to pre-judgment interest on its breach of contract claim from the time the City's debt became due at the state judicial interest rate. Nevertheless, MAS has stipulated in its post-trial findings of fact and conclusions of law that it is entitled to pre-judgment interest "accrued since August 29, 2002 (the date of MAS' judicial demand)." R. Doc. No. 97. Accordingly, because MAS has so stipulated, this Court will award MAS interest from August 29, 2002, at the state judicial interest rate. See *Teledyne Movible Offshore, Inc. v. C & K Offshore Co.*, 376 So.2d 357, 359 (La. App. 3 Cir. 1979) ("Unlike judgments in *ex delicto* actions wherein legal interest attaches from judicial demand under LSA-R.S. 13:4203, interest is recoverable on debts arising *ex contractu* from the time they become due, unless otherwise stipulated"); *Sanders v Wysocki,* 655 So.2d 713, 716 (La. App. 4 Cir. 1995).

MAS is also entitled to post-judgment interest at the federal interest rate accruing from the date of judgment until judgment is paid. 28 U.S.C. § 1961(a). Post-judgment interest is assessed against the entire amount of the final judgment, including pre-judgment interest. *Boston Old Colony Insurance,* 288 F.3d at 234.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CITY OF NEW ORLEANS	**CIVIL ACTION**
versus	**No. 02-130**
MUNICIPAL ADMINISTRATIVE SERVICES, INC.	**SECTION: I/2**

JUDGMENT

(Filed Jul. 15, 2003)

Considering the record, the evidence adduced at the non-jury trial, the Court's order entered on December 12, 2002, granting the City of New Orleans' motion for voluntary dismissal of its declaratory judgment action, and the Findings of Fact and Conclusions of Law entered this date, for the reasons assigned,

IT IS ORDERED, ADJUDGED, AND DECREED that there be judgment herein in favor of plaintiff in counterclaim, Municipal Administrative Services, Inc., and against defendant in counterclaim, the City of New Orleans, for the total sum of $1,001,044.00, together with interest thereon.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that there be a declaratory judgment entered herein directing the City of New Orleans to pay Municipal Administrative Services, Inc., the sum of $323,518.00 upon each receipt by the City of New Orleans of BellSouth Telecommunications, Inc.'s payments in the years 2004, 2005, and 2006, pursuant to the "Mutual Agreement of Compromise and Settlement" entered into between the City of New Orleans and BellSouth Telecommunications, Inc. on October 17, 2001.

New Orleans, Louisiana, this 15th day of July, 2003.

/s/ Lance M. Africk
LANCE M. AFRICK
UNITED STATES DISTRICT JUDGE

CITY OF NEW ORLEANS
v.
MUNICIPAL ADMINISTRATIVE SERVICES, INC.

No. CIV.A. 02-0130.

United States District Court, E.D. Louisiana.

Aug. 14, 2002.

ORDER AND REASONS

AFRICK, District J.

Plaintiff, the City of New Orleans (the "City"), has filed a motion to remand this action to the state court from which it was removed. Defendant, Municipal Administrative Services, Inc. ("MAS"), opposes the motion. For the following reasons, the motion to remand is DENIED.

FACTUAL BACKGROUND

On November 6, 1995, the City entered into an agreement with MAS, a Texas corporation, whereby defendant was to perform certain auditing and analysis services for the City[1] in exchange for an agreed upon sum plus a 20% contingency fee of any amounts "recovered, refunded or

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[1]Specifically, MAS was hired to perform an audit and analysis of BellSouth's franchise fee payments to the city. R. Doc. No. 4, p. 1.

credited."[2] An amendment to the agreement included a jurisdictional clause which provided:

> *JURISDICTION*
> The undersigned Contractor does further hereby consent and yield to the jurisdiction of the State Civil Courts of the Parish of Orleans and does hereby formally waive any pleas of jurisdiction on account of the residence elsewhere of the undersigned Contractor.[3]

After the services were performed, a dispute arose between the parties as to the amount of compensation owed MAS.[4] On December 17, 2002, the City filed this action in the

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[2]R. Doc. No. 4, Ex. A, p. 4.

[3]R. Doc. No. 4, Ex. B, p. 2. Although the original agreement executed by the parties on November 6, 1995, did not include the forum selection clause, the same was incorporated by a series of amendments to the agreement in April, 2000. *Id.;* R. Doc. No. 4, p. 3.

[4]Specifically, it is alleged that after services were performed, defendant was paid $495,426.00 pursuant to the terms of the agreement. Thereafter, on July 25, 2000, the City filed a lawsuit against BellSouth in Orleans Parish Civil District Court which BellSouth removed to this Court. Ultimately, that lawsuit was settled. Following the settlement, defendant made a demand on the City to pay it an additional 20% commission of the settlement benefits received by the City. The City, however, refused on the basis that it did not consider the settlement funds to be amounts "recovered, refunded or credited" as a result of defendant's audit and analysis. R. Doc. No. 4, p. 2.

Orleans Parish Civil District Court ("CDC"), seeking a declaratory judgment that it owed no contingency fee payments to MAS or, alternatively, that any payments owed are materially less and should be set-off against any unjust enrichment received by defendant.[5] On January 15, 2002, MAS, alleging diversity of citizenship of the parties pursuant to 28 U.S.C. § 1332, removed the action to this Court.[6] On January 29, 2002, the City moved to remand the case on the basis that the aforementioned clause requires litigation of this lawsuit exclusively in CDC.

Defendant denies plaintiff's allegations and argues that the above-cited clause does not prevent removal to federal court. Specifically, defendant argues that by agreeing to the jurisdictional clause, it only consented to *personal jurisdiction* in Louisiana and not to a specific venue, i.e. CDC.[7]

ANALYSIS

A party's consent to jurisdiction in a particular forum does not necessarily constitute a waiver of the right of removal based on diversity of citizenship. *City of New York v. Pullman Inc.*, 477 F.Supp. 438, 441-42, n. 11 (S.D.N.Y. 1979) (*citing Keaty v. Freeport Indonesia,* 503 F.2d 955 (5th Cir. 1974)) ("An agreement conferring jurisdiction in one forum will not be interpreted as excluding jurisdiction elsewhere unless it contains specific language of exclusion"). Rather, a waiver of the right of removal "must be clear and unequivocal" and may

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[5]*Id.*

[6]R. Doc. No. 1.

[7]R. Doc. No. 7, p. 3 (emphasis added).

not be presumed from ambiguous contractual language. *City of New Orleans v. National Service Cleaning Corp.*, 1996 WL 419750, (E.D.La. 7/24/96); *McDermott International Inc. v. Lloyds Underwriters of London*, 944 F.2d 1199, 1204 (5th Cir. 1991). While a waiver of removal rights must be clear and unequivocal, it need not "include explicit words such as 'waiver of right of removal." ' *Waters v. Browning-Ferris Industries, Inc.*, 252 F.3d 796, 797 (5th Cir. 2001). If the clause is ambiguous, "subject to opposing, yet reasonable interpretation," the clause will be construed against its drafter. *Zapata Marine Service v. O/Y Finnlines, Ltd.*, 571 F.2d 208, 209 (5th Cir. 1978).

"A forum selection clause is mandatory, and not permissive, where it clearly limits actions to the courts of a specific locale." *BP Marine Americas v. Geostar Shipping Co.*, 1995 WL 131056, p. 4 (E.D.La. 3/22/95). These clauses are typically referred to as mandatory forum selection clauses. *Id.* However, "[w]hen only jurisdiction is specified, the clause will generally not be enforced without some further language indicating the parties' intent to make jurisdiction exclusive."[8]

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[8]As the Court in *Unity Creations, Inc. v. Trafcon Industries, Inc.*, 137 F.Supp.2d 108, 111 (S.D.N.Y. 2001) explained:

> [I]f the parties' agreement stipulates that a state court shall be the *venue* for a dispute, the defendant's rights to remove the case to federal court would be deemed waived; removal would necessarily move the case to a venue other than the one in the agreement. However, if the agreement only establishes that a state court shall have *jurisdiction* over a dispute, the right to remove the case would not be affected; personal jurisdiction over a defendant is an issue distinct from the question of where

John Boutari & Son, Wines and Spirits, S.A. v. Attiki, 22 F.3d 51, 52-53 (2nd Cir. 1994); *Keaty,* 503 F.2d at 956. "[F]orum selection clauses have been construed as permissive where they show consent to the jurisdiction of a particular forum, but do not state that the forum has exclusive jurisdiction." *BP Marine Americas,* 1995 WL 131056 at 4.

In *Keaty v. Freeport Indonesia, Inc.,* 503 F.2d 955, 956 (5th Cir. 1974), the Fifth Circuit considered a forum selection clause that stated in pertinent part:

> This agreement shall be construed and enforceable according to the law of the State of New York and the parties submit to the jurisdiction of the courts of New York.

Objecting to plaintiff's choice of forum, i.e. the Eastern District of Louisiana, Freeport argued that the clause required any action arising out of the contract to be brought exclusively in the state courts of New York. *Id.* Keaty, on the other hand, contended that while he had agreed to submit to the jurisdiction of New York if sued there, the clause did not constitute a waiver of his right to sue or be sued elsewhere. *Id.* Noting that the clause did not, on its face, limit actions pursuant to the contract "to the courts of a specific locale," the Court held that the provision fell "short of being a mandatory forum section clause."[9] *Id.* Rather, the Court found that the clause was

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a trial will be held.

[9]The Court indicated that more specific and unequivocal forum language such as that used in M/S Bremen v. Zapata Offshore Co., 407 U.S. 1, 2, 92 S.Ct. 1907, 1909, 32 L.Ed.2d 513 (1972), *i.e.* "Any dispute arising must be treated before the London Court of Justice," is required for a court to find an unambiguous, mandatory forum selection clause. *Id.* at 957.

permissive and subject to opposing, yet reasonable, interpretations. *Id.* Accordingly, construing the clause against Freeport, the drafter of the clause, the Court held that the parties were not required to litigate the action in New York courts and it reversed the district court's dismissal for want of jurisdiction. *Id.*

More recently, in *Caldas & Sons, Inc. v. Willingham,* 17 F.3d 123, 127 (5th Cir. 1994), the Fifth Circuit considered whether a forum selection clause, providing in part that " 'the laws and courts of Zurich shall be applicable," mandated that the lawsuit before it be litigated in Zurich. Applying the *Keaty* analysis, the Court held that despite the presence of the term "shall," which is generally mandatory, the clause "need not necessarily be classified as mandatory." *Id.* Rather, the court stated:

> The only thing certain about the clause in the [parties'] contract is that the parties consented to the personal jurisdiction of the Zurich courts. Beyond that, however, the language does not clearly indicate that the parties intended to declare Zurich to be the exclusive forum for the adjudication of disputes arising out of the contract. As we stated in *Keaty,* "this is not a situation where the contract, on its face, clearly limits actions thereunder to the courts of a specified locale."

Id. at 128 (*citing Keaty,* 503 F.2d at 956). Accordingly, finding the clause ambiguous, the Court construed it against the defendant, i.e. the drafting party, as a permissive forum selection clause.[10] *Id.*

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[10]*See also, John Boutari,* 22 F.3d at 52 (holding that a clause that provided that "[a]ny dispute arising between the parties hereunder shall come within the jurisdiction of the competent Greek Courts, specifically of the Thessaloniki

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Courts" was not mandatory where it mandated "nothing more than that the [Greek courts] have jurisdiction"); *Hunt Wesson Foods, Inc. v. Supreme Oil Co.,* 817 F.2d 75 (9th Cir. 1987) (provision stating, "[t]he courts of California, County of Orange, shall have jurisdiction over the parties in any action at law relating to the subject matter of the interpretation of this contract," held to be permissive); *Raspino v. JRL Enterprises, Inc.,* 2001 WL 845455, p. 2 (E.D. La.7/25/01) (finding that provision that stated that "the parties hereby agree to submit to the jurisdiction of the courts of the State of New York," did not convey any exclusivity about the choice of New York as the proper venue and thus, lawsuit could be brought in Louisiana courts); *BP Marine Americas v. Geostar Shipping Co.,* 1995 WL 131056, p. 4 (E.D. La.3/22/95) (holding that language in forum selection clause stating that "[t]he High Court in New York shall have exclusive jurisdiction over any dispute which may arise out of this Charter" was ambiguous and thus, not enforceable, where the clause referred to a forum that did not exist); *John's Insulation, Inc. v. Siska Construction Co., Inc.,* 671 F.Supp. 289, 293 (S.D.N.Y.1987) (finding that clause that provided, "any action hereunder shall be commenced in the Supreme Court of the State of New York" was permissive, and thus, action could properly be removed to federal court insofar as clause only designated the forum where action could be *commenced*) (emphasis added); *Links Design. Inc. v. J. Lahr.* 731 F.Supp. 1535, 1536 (M .D. Fla.1990) (holding that language in clause providing that "the proper venue for said action shall be Polk County, Florida" was permissive where the clause could reasonable be interpreted as permitting removal of case to the federal district court for the district including that county).

Compare with Waters v. Browning-Ferris Industries, Inc., 252 F.3d 796, 798 (holding that forum selection clause was

unambiguous and that defendant, therefore, waived its right to remove by agreeing that it could be sued in any court in Texas, that it consented to the jurisdiction of any such court in Texas, and that it *waived "any objection it may have to the laying of venue* of any such suit") (emphasis added); *Sterling Forest Associates v. Barnett-Range Corp.*, 840 F.2d 249, 250, 252 (4th Cir. 1988) (holding that clause which stated that "the parties agree that in any dispute jurisdiction and *venue* shall be in California," was mandatory) (emphasis added); *Nascone v. Spudnuts, Inc.*, 735 F .2d 763, 765 (3rd Cir. 1984) (provision which stated, "this franchise shall be construed according to the laws of the State of Utah, and venue for any proceeding relating to the provisions hereof shall be Salt Lake County, State of Utah," held to be explicit, and thus, mandatory); *Docksider, Ltd. v. Sea Technology, Ltd.*, 875 F.2d 762, 763 (9th Cir. 1989) (finding that forum selection clause which stated that "[v]enue of any action brought hereunder shall be deemed to be in Gloucester County, Virginia" was mandatory because it made it clear "that venue, the place of suit, lies exclusively in the designated county"); *City of New Orleans v. National Service Cleaning Corp.*, 1996 WL 419750 (E.D. La. 7/24/96) (finding that language in forum selection clause that provided that "[t]he contractor hereby consents to and stipulates to the personal jurisdiction *and venue* of the Civil District Court for the Parish of Orleans" was specific as to personal jurisdiction and venue and, therefore, foreclosed defendant's right to remove to federal court); *Pelleport Investors, Inc. v. Budco Quality Theaters, Inc.*, 569 F.Supp. 612, 613-14 (C.D. Cal. 1983) (holding that defendant waived his right to remove by agreeing that all disputes "shall be litigated only in the Superior Court for Los Angeles, California"); *Central Contracting Co. v. Maryland Casualty Co.*, 367 F.2d 341, 343 (3rd Cir. 1966) (provision which stated, "The subcontractor agrees that it will not

Plaintiff argues that although there are not explicit terms waiving the right of removal, such waiver is nevertheless implicit by the fact that MAS agreed to "waive any pleas of jurisdiction on account of the residence elsewhere of the undersigned Contractor."[11] As stated, a waiver of removal does not have to include explicit words such as "waiver of right of removal."[12] However, the quoted language may reasonably be interpreted as constituting a waiver by MAS of any claim of lack of personal jurisdiction over it in Louisiana. The situation in *Waters v. Browning-Ferris Industries, Inc.*, 252 F.3d 796, 797 (2001), a case relied upon by plaintiff, is different. In that case, language in the contract included a statement that defendant agreed to "waive any objection it may have to the laying of venue." The language of the clause at issue is not nearly as clear or unequivocal and, most significantly, makes no mention of any waiver of venue.

The Court finds that the forum selection clause at issue does not clearly limit litigation arising out of a breach of the parties' agreement to a specific forum. The clause mentions only jurisdiction and not venue. It does not mandate an intent that CDC be the exclusive forum to litigate any dispute. To the contrary, the most that can be said about the forum selection

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commence any action ... arising out of ... this subcontract agreement, in any Courts other than those in the County of New York, State of New York," held to be mandatory and enforceable).

[11]R. Doc. No. 4, Ex. B, p. 2.

[12]*Waters v. Browning-Ferris Industries, Inc.*, 252 F.3d 796, 797 (2001).

clause is that MAS consented to the personal jurisdiction of Louisiana courts.[13]

At best, the clause at issue is permissive. Construing any ambiguity in the clause against its drafter, i.e. the City,[14] and in favor of MAS, IT IS ORDERED that the motion of plaintiff, the City of New Orleans, to remand is DENIED.

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[13]Jurisdiction and venue are separate and distinct concepts. "Jurisdiction" refers solely to "the court's power to decide a case or issue a decree," while "venue" refers to "the proper ... place for the trial of a lawsuit." Black's Law Dictionary, pp. 855, 1553 (7th ed. 1999).

[14]The City does not contest the fact that it drafted the clause at issue.